



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



3 2044 057 937 542



HARVARD LAW SCHOOL  
LIBRARY







## **FOREWORD**

This volume is an exact photo-reproduction of an original copy of

## **YALE LAW JOURNAL**

### **Volume 9**

As an original is practically unobtainable, this reprint is offered to enable law libraries to fill out their collection of legal periodicals.

The reproduction follows the original in every detail, and no attempt was made to correct errors and defects in typography.

DENNIS & CO., INC.

Buffalo, N. Y.  
February, 1950



# YALE LAW JOURNAL.

VOLUME IX.

OCTOBER, 1899—JULY, 1900.

---

NEW HAVEN, CONN.

Published by Yale Law Journal Company, 1900.

PER  
K  
29  
.A4  
v.9

## INDEX.

- A Foreign Sovereign in an American Court, *John W. Foster*, 283
- Evolution from Radicalism to Conservatism in the History  
of American Political Parties, . . . *Nathan A Smyth*, 31
- How England Governs Her Colonies, *Lebbeus R. Wilfley*, 207
- Incorporation, . . . . . *Thomas Thacher*, 82
- In re Augur, . . . . . *Livingston W. Cleaveland*, 259
- Municipal Government and Its Demands on Good Citizen-  
ship, . . . . . *Edwin F. Sweet*, 73
- Non-Satisfaction as a Defense in Case of Contract,  
*Grosvenor Nicholas*, 114
- Result of Expansion, . . . . . *Talcott H. Russell*, 239
- Some Observations on the Status of Cuba,  
*Carman F. Randolph*, 353
- The Beginning of a War, . . . . . *Theodore S. Woolsey*, 153
- The Constitutional Requirements of Uniformity in Duties,  
Imposts and Excises, . . . . . *William B. Bosley*, 164
- The Date for the Opening of The Twentieth Century,  
*Simeon E. Baldwin*, 161
- The Effect of a Decision Sustaining a Demurrer to a Com-  
plaint, . . . . . *S. C. Loomis*, 387
- The English System of Registration, . . . *Jacques Dumas*, 341
- The Future of Civil Service Reform, . . . *Edward Carey*, 246
- The Indeterminate Sentence, . . . . . *Charlton T. Lewis*, 17
- The Law of Our New Possessions, . . . *William W. Howe*, 379
- The Newspaper Before the Law, . . . . . *George D. Watrous*, 1
- The Organization of a Territorial Government for Hawaii,  
*Alfred S. Hartwell*, 107
- The Philippines, . . . . . *Jacob G. Schurman*, 215
- The Porto Rico Tariffs of 1899 and 1900, *Edward B. Whitney*, 297
- The Third View of the Status of our New Possessions,  
*George B. Costigan, Jr.*, 124
- The United States Bankruptcy Law of 1898,  
*Henry G. Newton*, 287
- Webster on the Territories, . . . . . *Paul R. Shipman*, 185



Dennis & Co.

# YALE LAW JOURNAL

Vol. IX.

OCTOBER, 1899.

No. 1

4/5/50

## THE NEWSPAPER BEFORE THE LAW.

Imbedded in the Constitution of every State of the Union and in terms substantially identical, is a guaranty of the liberty of the press and of the freedom of speech, invariably, I believe, coupled with a provision for responsibility in case of abuse.\*

Yet, strangely enough, the proposition of Charles Pinckney of South Carolina to insert such a clause into the Federal Constitution was rejected, and it was not until the First Congress set about to remedy the defects of the original instrument, that such a principle was adopted as a part of the first amendment to the Constitution of the United States. It is there provided that Congress shall make no law "abridging the freedom of speech or of the press."

So essential a characteristic of Civil Liberty does this freedom seem to us, that it is difficult to realize how modern is its growth and how tremendous a struggle it involved between government and press.

And yet it was as late as 1792 that Sampson Perry, editor of the *Argus*, was tried and convicted of criminal libel in England, for saying that "the House of Commons are not the real representatives of the people."

And to this day it remains the parliamentary theory in Great Britain that all reporting of its proceedings is a breach of privilege, upon the singular ground that it tends to make members of parliament answerable to their constituencies, rather than to their consciences.

---

\*That of Connecticut is found in Art. I. of the Constitution: "§ 5. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty. § 6. No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

In this and in many other ways, the common law of England relating to the law of libel and the supervision of the press remains unchanged to this day. Yet prosecutions have all but ceased, for public opinion is really the guaranty of freedom.

Press censorship originated in the Church of Rome, as being necessary to the integrity of religion and to the protection of the people against heretical teachings.

Pope Alexander VI. in 1501 first announced the authority of the Church over printed publications, and in 1515 the Fifth Council of the Lateran formally decreed that no printed matter whatever should issue except with the written sanction of the Bishop or of the inquisitor of the diocese. This moral guardianship has been maintained by the Congregation of the Index.

At the Reformation, the Crown, in England, assumed the functions of press censorship formerly exercised by the Roman Church.

In the very infancy of the art of printing it became apparent that a free press was incompatible with absolute government, and the history of the press down to the end of the 18th century is that of a constant struggle between the government and the people, led and represented by the press, toward freedom of thought and speech.

The period of the Commonwealth was one of comparative freedom, but Cromwell conceded the liberty of printing rather from contempt of the power and influence of the press than from higher motives. One of the first measures instituted after the Restoration, was the suppression of the newspapers. A system of licensing was adopted, which was not abolished until 1694.

Attention has been called to the fact that even at the time of the Revolution of 1688 so little importance was attached to the influence of the press as a means of popular agitation and political reform, that no allusion to the liberty of the press was made either in the Bill of Rights or in the Act of Settlement. The real development of the modern newspaper began at about this period, with the refusal to re-enact the licensing law. But the publication of political news remained for a long time illegal. The House of Commons claimed for itself as a body and for its individual members, exemption from all criticism for official acts and conduct.

Different expedients were from time to time resorted to, to retain control over the press. Heavy taxes were laid upon circulation and upon advertisements, and the stamp duty was gradually increased until in the reign of George III. it had risen to 4d for each newspaper.

It was not until 1853 that the duty on advertisements was removed, and in 1855 the stamp duty, then of 1d, was abolished.

The attitude of the Colonial Governments in America toward the press was no less severe.

Massachusetts in 1662 appointed two persons licensers of the press, and prohibited any publications not supervised by them. Even the laws were not at first published for general circulation. When the magistrates of Massachusetts in 1649, yielding to popular demand, permitted them to be published, they did so under protest, deeming it "a hazardous experiment."

The royal instructions to all of the colonial governors throughout the colonial era contained this clause: "And forasmuch as great inconvenience may arise by the liberty of printing within our province, you are to provide by all necessary orders that no person keep any press for printing, nor that any pamphlet, book, or other matters whatsoever be printed without your special leave and license first obtained."

With the growth of popular intelligence and means of communication, and with the increased fullness in the development of national and civic life, it was inevitable that both in this country and in England many of the bonds which fettered the press should be broken. Newspapers increased rapidly in numbers and in circulation, and in so far as matters of general news and information were concerned, the government relaxed its control, and the contest resolved itself into a determination upon the part of the government to prevent the publication of political news and comment, and on the part of the press to evade or defy its restrictions.

This contest is intimately associated with—indeed, inseparably connected with—the development of the law of criminal libel.

From the Restoration to 1729, newspaper reports of parliamentary proceedings were unknown.

From that time on, numbers of printers were prosecuted every session for printing fragments of parliamentary speeches. It was the custom to do so as though they were imaginary, and designating their authors by initials or nicknames. The usual fine was £100. In 1764 one paper paid that sum for merely mentioning the name of Lord Hereford. In that year 200 criminal informations were filed against printers.

Popular sympathy led to the belief that the judges were too harsh in their suppression of the discussion of public affairs, with the natural result that juries were exceedingly lenient toward the accused.

Parliament, no less than the Crown, showed extreme anxiety to withdraw press cases from the control and cognizance of juries. The House of Commons, in its determination to suppress the dis-

cussion of public affairs, excepted libels from the list of offenses covered by the parliamentary privileges of its members.

The Attorney-General, by the *ex-officio* information, was able to bring libel cases to trial without previous indictment by the grand jury.

The test of strength then came between the court and the jury; the former declaring that the question of whether the subject matter was libelous or not was entirely one for the court, and that the function of the jury was only to decide whether or not the publication had been made.

In 1770 Woodfall was tried for publishing the letters of Junius; in particular that which accused the King of cowardice.

Lord Mansfield following in this respect a long list of eminent judges, declared that the question of libel or no libel was for the court.

To his charge the jury replied by a verdict of "Guilty of printing and publishing only." This was at once set aside and a *venire de novo* ordered,\* but meanwhile Miller, who had reprinted the letter in question, had been prosecuted and acquitted, to the unbounded gratification of the public.

In its discomfiture the government abandoned the further trial of Woodfall, and by its surrender was established the right of the press to criticise the conduct, not merely of ministers of Parliament, but of the King himself.

In 1792, largely through the influence of Lord Camden, Mr. Fox caused to be passed an act entitled "An act to remove doubts respecting the functions of juries in cases of libel."

This was not by way of amendment, but was expressly stated to be declaratory of the Common Law. It was declared that the law of England had always been as advocated by Lord Camden, and that in criminal proceedings the question of libel or no libel is for the jury and not for the judge.

By this act, the battle was all but won.

There remained but one important change, which in this country was worked out mainly as the result of two famous trials for libel; one in the Colony of New York, in 1735; the other also in New York, after it had attained statehood, in 1804.

It was a *dictum* of Lord Mansfield that in criminal prosecutions for libel, "the greater the truth, the greater the libel."

By this was meant that the law took cognizance of the evil effect of derogatory and offensive publications, as detrimental to

---

\* *Rex v. Woodfall*, 5 Burr. 2661.

government and as tending to provoke a breach of the peace, irrespective of their truth or falsity.

In case of a *false* defamatory statement, the civil courts were open for redress, while in many cases of aggravated and unwarranted and yet *truthful* attacks upon reputation, there was no means of redress. The very impossibility of disproving the statement was deemed likely to provoke to assault as the only means of vindication.

For this reason Courts would not even permit the truth to be shown, if the publication were made with malice and without justification and were of a wanton, indecent or aggravating nature.

John Peter Zenger published in the columns of his *New York Weekly Journal*, satires and criticisms upon the administration of Governor William Crosby, which led to his arrest and prosecution for criminal libel. His paper was ordered burned by the common hangman, and for nine months he lay in prison before he could obtain a trial. When it came Chief Justice De Lancey disbarred Zenger's counsel for questioning the validity of the judge's commission, and Andrew Hamilton, a noted lawyer of the day, came on from Philadelphia to conduct the defense.

Zenger entered a plea of 'not guilty, admitted the publication and sought to justify it by proving its truth. The chief justice refused to permit this and charged the jury that the publication was libelous and that it was their duty to return a verdict of guilty. They soon brought in a verdict of not guilty.

Mr. Hamilton's address in defense of his client and in vindication of the liberties of the press, is deemed a classic.

In commenting upon this case, in a recent address, Hon. H. C. Caldwell, presiding judge of the U. S. Circuit Court of Appeals for the Eighth Circuit, said: "The verdict electrified the country. Gouverneur Morris, one of the ablest and most sagacious statesmen of the revolutionary period, dated American liberty, not from the Stamp Act of 1765, nor yet from the 'Boston Tea Party,' but from the verdict of the jury in Zenger's case. The rendition of this verdict constituted the immortalizing moment of those men's lives, and is the richest heritage of their descendants. If the names of these twelve patriots were at hand they would appear here. Their names should go down in history with those of the foremost patriots of the Revolution. This historic incident would not be complete, without adding that the people bore Zenger's lawyer, Hamilton, out of the court-room on their shoulders, and that the Common Council of New York gave him the freedom of the city in a gold box for his



gratuitous services in 'defense of the rights of mankind and the liberty of the press.' " \*

The other case, nearly seventy-five years later, was that of Harry Crosswell, who was indicted in 1804 for a libel upon President Jefferson.† This led to a change in the law of New York, by statutory enactment, permitting the truth to be given in evidence in all criminal prosecutions for libel.

Alexander Hamilton, in this case, made one of the most brilliant oratorical efforts of his life, and his definition of criminal libel in connection with political offenses, is now the accepted doctrine in all of the States.

"Nothing is a libel which is written and published from good motives and for justifiable ends; and to show this, the truth of the facts charged as libelous may be given in evidence, and this whether against public measures, public officers or private citizens."

In nearly every one, if not all of the States, the victory won was guaranteed by constitutional provisions, of which that of New York of 1821 is typical, and perhaps the most clearly stated.

"Every citizen may freely write, speak and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain the liberty of speech or of the press. In all prosecutions or indictments for libels, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted, and the jury shall have the right to determine the law and the fact.

Incomplete as this outline historical sketch may be, it perhaps may give us a fair understanding of the present law of criminal libel and of the responsibility of the newspaper to the sovereignty.

The freedom of the press means at least this, that it is to be exempt from censorship, and may publish what it deems proper, being responsible only for the abuse of that privilege.

Censorship as a war measure, and based upon matters of State and public expediency, will be accepted by most persons as a justifiable exception.

We have seen to what extent the newspaper is accountable to the sovereign power of the State for the abuse of the privilege of

\* "Trial by Judge and Jury," an address before the Missouri State Bar Association, 60 Albany Law Journal, p. 39. The names of the jurors were furnished through the courtesy of Mr. Newman Erb, and appear in a note on page 40, with a reference to the pamphlet containing a report of the trial.

† *People v. Crosswell*—3 Johnson's Cases, 336.

free publication. But in addition to this, there is a further accountability to the person defamed, to be enforced in a civil action for damage to his reputation. A totally different theory prevails here from that which pervades the criminal law.

The liability is based upon the presumption that every man is entitled to such reputation and standing in the community as he may deserve, and that no man is legally entitled to defend an ill-gotten reputation, and that the publication of the truth can never result in a legal injury to him. While, on the one hand, the criminal law at one time would not even permit the truth of defamatory matter to be shown in evidence, on the other hand, in the civil courts proof of the truth of the matter published is invariably a complete defense to the action. There are, indeed, traces of an earlier doctrine more closely akin to that of the criminal law permitting the truth to be proved, but only in mitigation of damages, but I believe that there is now no exception to the rule which I have just stated, and which permits a newspaper to publish anything whatsoever of a person, with whatsoever motive, without responsibility, in a private action for damages, provided it is prepared when called upon to prove the truth of the charge.

But this truth must always be specially set up as a defense by the defendant in his pleadings, and must be proved by a preponderance of evidence upon the trial. If this is not done, the truth may still in some cases be proved to rebut actual malice and mitigate the damages, but cannot bar the action. In this respect the law extends to the press the fullest possible liberty of publication, holding it responsible merely for the abuse of that privilege.

But in a great many cases—and I do not say this in contempt of the morality of the journalist—the statement complained of is not true. What, then, are the respective positions of the newspaper and its victim?

The full and free discussion of all public affairs and of all trials and proceedings of legislative, executive and judicial bodies, is privileged; provided, however, that in case of judicial proceedings they are not *ex parte*, and do not hinder and obstruct the Court in its performance of its judicial duties, and thereby amount to a contempt of Court.

The publication of *ex parte* proceedings is not privileged, says Judge Cooley (Cooley on Torts, p. 258), because it "tends to poison the source of justice and to prejudge those whom the law still presumes to be innocent."

But in the discussion of ordinary matters of news, there is no privilege accorded to the press by the common law. For the false

and malicious publication of matter derogatory to reputation, either damaging *per se* or because of peculiar circumstances, there exists a civil liability for such damages as the jury may see fit to award, not, of course, exceeding the amount demanded in the complaint. These may be intended as actual damages, the assessment of which must, of course, rest in the discretion of the jury, from the nature of the case, or, in extreme cases of wanton and malicious publications, exemplary damages or smart money may be included. As to a very large portion of a newspaper's contents, therefore, in relation particularly to matters of local gossip and private affairs, no privilege exists, unless especially conferred by statute.

Of late years, however, statutes have been enacted in a very large number, perhaps all, of the States, whose purpose it is to extend to the newspaper an additional privilege with respect to such news, if published in good faith, and without malice. In all such cases it is incumbent upon the plaintiff to prove malice as a matter of fact, and it is no longer to be inferred, as in general it is, or may be, from the falsity and derogatory nature of the language used. The Connecticut statute, Sec. 1116, reads as follows:

"In every action for a libel, the defendant may give proof of intention; and unless the plaintiff shall prove either malice in fact, or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damage as he may have specially alleged and proved."

In common speech this means that the plaintiff can recover no more than his actual damage unless he can prove unjustifiable publication or a failure to retract, upon demand.

In the case of *Arnott v. The Standard Association*, 57 Conn., p. 86, the Court said that this statute was enacted in the interest of publishers of newspapers, and intended to furnish them a measure of protection in the publication of current news, criticisms upon public men and measures, and comments upon matters of public interest. It gave the defendant a right to prove in justification that the publication was intended merely as an item of news or of fair and just criticism upon men and measures, and if he could make such proof, the plaintiff could recover nothing but such actual damage as he might have alleged and proved, unless either there was a refusal to retract upon written request, or the plaintiff was able to prove actual malice or malice in fact. In that particular case the libelous matter complained of was this: "Mr. Eaton might endorse a person, and he would be more likely to do so than not, but

he would not willingly endorse a thief, a jail-bird or a sneak like Arnott." The defendant set up by way of "proof of intention" that by a mistake in punctuation, and a failure to insert a comma after the word jail-bird, it was made to appear that all such epithets were intended to apply to Arnott, but such was not the intent of the publishers. This explanation was doubtless satisfactory to the jury, for a verdict was given to the defendant, and the Supreme Court held that it was not erroneous.

With the enormous expansion of the number and the circulation of newspapers, and with the occasional recklessness of the reporter on the scent of a sensation, it is not in the least surprising that the columns of the press are plentifully sprinkled with the seed of litigation, and yet the number of libel suits is astonishingly small. Why is this? The answer would seem to be this: The public has become so accustomed to the unreliability of press statements, whether through error, political warfare or spite, as to give them little heed, and to well understand that no public man can possibly remain free from vilification. It is also well understood that in large numbers of cases such false statements have little tendency to injure, and are readily discounted in advance. No public man can devote his whole life to the prosecution of libel suits, and yet, if he once began, he could do nothing else. It has come to be regarded undignified to seek redress at law, and the man would subject himself to the ridicule of the community should he take seriously the abuse which is heaped upon him.

The overwhelming volume of the newspaper circulation of the country contains in itself a better remedy for this abuse. The most outrageous libels upon a member of one party are matched by equally untrue praises in the organs of the other; and the bewildered people know not what to believe, and believe nothing. Now and then there may be a libel so gross or touching one so exclusively in his private or family life, that he feels bound to resort to the courts, and occasionally an enormous verdict is given the plaintiff, but usually he is very glad to get his six cents. Such a verdict as this, while perhaps not generally so regarded, is really a contemptuous reflection upon the influence of the defendant newspaper, for good or for evil.

It may be said in general that an injunction will not issue to restrain the printing and publication of a threatened libel, though there are some exceptions where the threatened publication would be injurious to property; and there are some instances in which courts have issued orders in the nature of injunctions to prohibit the publication of testimony prior to the decision of the cause. (Am.

& Eng. Enc., Injunction, p. 896.) It is intimated that the courts have power in this way to prevent the publication of pending judicial proceedings. (Note to *State v. Galloway*, 98 Am. Dec., p. 419, and cases.)

Such a remedy is, however, very rarely adopted, as there are other means of enforcing compliance equally efficacious. The Court may feel bound, from the nature of the testimony or of the case, in the interest of public morals, or to avoid local prejudice or demonstration, to prohibit the publication of testimony. In some jurisdictions this may be done either by an order excluding the public from the court room, or by an order prohibiting or regulating the publication, declaring a violation of the order to be contempt. In such a case its violation may sometimes be so punished. But the most satisfactory method of control is by non-interference, and a punishment for contempt if the privilege of fair discussion is abused.

A considerable branch of the law as to contempt of court is of recent growth, and is rapidly developing, having to do with newspaper publications in relation to the dignified and orderly conduct of the judicial business of the country. Contempts are divided into two general classes; civil and criminal. While agreeing upon the classification, courts are not agreed as to the location of the division line. Speaking generally, the former have to do merely with the violation of orders of court injurious to the adverse party, as in the case of disobedience of injunctions, orders in relation to alimony, *mandamus* proceedings, etc. Attachment for contempt is also the way by which a court of equity enforces its decree. While a court of law grants an execution, a court of chancery issues an order requiring some act or omission of the party. As there is no way in which this conduct may be compelled, the court must needs content itself with the personal punishment by fine or imprisonment for the violation of the order.

Criminal contempts, however, have to do with any and all acts which, in or out of the presence of the court, hinder, obstruct or impede its functions.\* Actual contempts of the authority of the court by rude, insulting or disorderly conduct while the court is in session, do not as a rule present any interesting or difficult questions of law. Another classification is into direct and constructive contempts.

---

\* "Generally, it may be said that a criminal contempt embraces all acts committed against the majesty of the law, and the primary purpose of their punishment is the vindication of public authority." 7 Am. and Eng. Encyl. of Law, 2d Ed. 28.



There are, however, in all cases of contempts, certain peculiarities of procedure which render them a terror to the offender. Of necessity the court whose dignity is insulted must have the power of summary disposition of the cause, and must itself pass upon it. The offender is, indeed, entitled to be heard in his defense, and an apology is frequently accepted, but the court possesses the power summarily to punish by fine and imprisonment, and the judge to whom the insult has been personally offered is hardly in the position of a disinterested tribunal; although it must be said that the very delicacy of the position of the court gives rise to the utmost caution in exercising this terrific power, and instances of its abuse are very rare.

A still more peculiar characteristic is that at common law (and the same is in general true to-day in the absence of statute), no right of appeal existed in contempt cases, nor could the question of the action of the court be reviewed in any way. There are some exceptions to this rule, where the question of whether the act done constitutes a contempt, is submitted to the court as a question of law.\* Nor can the question be raised by a writ of *habeas corpus*, unless the judge has exceeded his jurisdiction. If he is within his jurisdiction, the judgment is valid, and if valid, no relief can be had upon *habeas corpus*. The law will not permit the question to be reviewed in that or in any other way, if within the jurisdiction of the court.

The party is entitled to be heard, though only in proper person and not by counsel. The severity of this rule, however, is now generally relaxed. There is no right of trial by jury. The accused is given the right to purge himself of the contempt, by his answers, and in many States his answer under oath is conclusive as to the meaning and purpose of the acts done or language used.

This brings me to a very important branch of our subject; the responsibility of a newspaper to the court, under process for contempt. It is, of course, clear that a newspaper publication cannot be a contempt of court in the sense in which the term has heretofore been used, and the contempt, if it exists, is what is known as the constructive contempt, or, as it is sometimes said, contempt of court out of court. Interference with property *in custodia legis*; suing a receiver without leave of court, etc., are other instances of constructive or indirect contempts.

I shall briefly discuss the principles which the most recent cases have adopted in dealing with this subject, in order to indicate the limitations upon the power of the press to criticise the courts and

---

\* Tyler v. Hamersley, 44 Conn. 393-6.

their doings, and to show how the Government, through its judicial branch, has regained a very substantial part of the power which formerly rested to a greater extent with the executive or legislative department.

Simple as these principles are as legal propositions, their application is sometimes exceedingly difficult, where an attempt must be made to fix the boundaries beyond which the public press may not go in publications respecting judges and judicial proceedings; and, on the other hand, beyond which the judges and the courts may not go in restraining the freedom of the press and in punishing it as for improper interference with these proceedings, or for bringing them into unmerited contempt.

In addition to the power to punish any disorderly, tumultuous or disrespectful conduct in its presence, the court is also clothed with the inherent power to punish any act or publication which is calculated to disturb the business of the court, to impair its usefulness, to interfere with its orders or process, or which tends to bring it into disrespect or contempt. These powers, it is conceded, so far as constitutional courts are concerned, not only do not owe their existence to legislative action, but they are not subject to destruction by the legislative power, although their exercise may be regulated. This, at least, is the doctrine with respect to contempts in the presence of the court, and to interference with its process.

Implied in the very existence of the court is the power to compel orderly and respectful proceedings and demeanor on the part of all persons coming into its presence, obedience to its judgments and mandates, and the refraining from all acts and words which may tend to pollute the administration of justice, or which may discredit the courts and judges by imputing to them dishonorable motives in the discharge of their duties. Courts must have the power to protect and vindicate themselves and the honor of their judges and officials.

With respect, however, to courts owing their existence to legislative action, the right to punish for contempt may be abridged.\*

It is usual to divide alleged contempts of courts by newspapers and their publications into two classes: those in which it is claimed that the object of the publication was to affect, or its tendency was naturally to affect, the decision of a pending cause; and the other class including those whose apparent purpose is to bring the courts or their judges or other essential officers into discredit.

As to the first class of cases, any publication pending a trial,

---

\* 7 Am. and Eng. Ency. of Law, p. 32.

whose object is to influence or terrorize either judges, prosecuting officers, jurors, grand jurors, witnesses, or parties, constitutes most clearly a contempt of court. Where, however, the case is once decided, the capacity for this particular evil ceases, and it is a matter of much more difficulty to make out a case of contempt. Such publications are apt to take the form of a comment upon the conduct of the judges or jurors, and it becomes a matter of the utmost delicacy to decide whether the proper punishment is by way of a suit or prosecution for libel at the instance of the judge, or whether the attack is upon the dignity of the Court as such, so as to hinder, impede or obstruct it in the proper performance of its public duties.

It may be said in general that it is the tendency of modern decisions, where the comment bears no relation to the cause then pending, to regard the reflections as rather upon the character of the individual judge than upon the function and dignity of the Court. Where, however, the matter does or may affect a pending case, the arm of the law is long, and will reach the publisher of any matter the tendency of which is pernicious.

And yet we are not without decisions authorizing commitment for contempt, even for comment upon past proceedings, either based upon the common law or upon special statute.\*

So far as I know, the question of the extent to which a newspaper may lawfully comment upon the proceedings of a court has never come up before the highest court of Connecticut, and only one case has come to my notice in which the right has been questioned. In that instance the accused were allowed to purge themselves of contempt and were dismissed with a caution.

A few words in relation to two or three of the most recent cases may perhaps serve to illustrate the most important features of this doctrine in practice. A few years ago the divorce suit of Price v. Price was on trial in California, and the court was advised that the evidence would probably be of such a nature that all persons should be excluded from the court room during the progress of the suit. Such an order was passed by the court, and it was further ordered "that no public report or publication of any character of the testimony in the case be made." The next day Mr. Shortridge, editor of the *San Jose Mercury*, published an article referring to the order of the court, and containing what purported to be the testimony of the witnesses. He was summoned to appear and show cause why he should not be adjudged guilty of contempt. In his answer he disclaimed any intention of reflecting upon the court, or of show-

---

\* *State v. Morrill*, 16 Ark. 384.

ing any disrespect for it, and claimed that in publishing a fair and true report of the testimony and proceedings he was simply exercising a constitutional right with which the court could not interfere, by order or otherwise. He was, nevertheless, judged guilty of contempt of court, and ordered to pay a fine of \$100. The Supreme Court of the State (*in re Shortridge*, 99 Cal. 526), in a carefully considered opinion, ruled that the statute which permitted the court to direct a trial in divorce cases to be private, and to exclude the public from the court room, did not go so far as to permit an order that no public report of the testimony should be made. There was, therefore, no liability for contempt in making such a publication. As this report contained no reflection upon the judge and nothing to intimidate any witnesses, or other persons connected with the trial, it could not constitute a contempt of court, even though the court had forbidden its publication, and if the publication could not have interfered with the full and fair investigation of the merits of the case, no contempt could have been committed. The proceedings of the lower court were therefore annulled.

Another recent case,\* decided in the fall of 1897, involved the question of how far a judge who was a candidate for re-election could go in the direction of punishing as for contempt the publication of newspaper articles reflecting upon his impartiality and honesty in the trial of cases already disposed of. Judge Bailey was a candidate for re-election, his term expiring in January, 1898, and the election was to take place on the 6th of April, 1897. During the month of March Judge Bailey was engaged in holding court, and on the 11th of that month an article was published charging the judge with being extravagant in the management of the court, with being partial and unfair in respect to his official conduct in the trial of causes, and with being influenced by corrupt motives. The authors and publishers of the articles were summoned before Judge Bailey, and after a few continuances of a few hours each, an alternative writ of prohibition from the Supreme Court was served upon Judge Bailey, prohibiting him from taking further cognizance of the contempt proceedings. He therefore stayed those proceedings, but adjudged the parties guilty of a new contempt in the presence of the court, by reason of their filing an affidavit alleging the truth of the original articles published by them. It being adjudged by the Supreme Court that both of these proceedings for contempt were in excess of the jurisdiction of the court, the writ of prohibition was made absolute. The argument was pressed that such publications

---

\* State ex rel. Atty. Gen. v. Circuit Court of Eau Claire Co., 97 Wis. 1.

as were the subject of investigation tended to diminish the respect due to the court in the trial of future causes, and thus impair its usefulness; but it was said, this doctrine is certainly extreme. Carried to its ultimate conclusion it would call for the punishment of any adverse criticism on the official conduct of the sitting judge, and absolutely prevent all public or private discussion of court proceedings. It is true, Judge Bailey was a candidate for re-election, but if he had been a candidate for any other office than that of judge, it would not for a moment be claimed that the publications in question would afford ground for any other legal action than an action for libel in the regular course of the law. But the claim was made, that because he was a judge and was holding court at the time, such unfavorable criticism of his past actions may be summarily punished by the judge himself as for contempt. "Truly," says the court, "it must be a grievous and weighty necessity which will justify so arbitrary a proceeding, whereby a candidate for office becomes the accuser, judge and jury, and may within a few hours summarily punish his critic by imprisonment."

The penalties of the law have generally fallen upon the individuals who have personally taken part in the writing or printing of the objectionable matter. But in January, 1899, the Supreme Judicial Court of Massachusetts held that a corporation, as the proprietor of a newspaper, might be adjudged guilty of contempt and punished by a fine, though of course not, in the nature of things, by imprisonment. And this, too, under circumstances quite startling at first sight. A case was upon trial before the Superior Court, for the assessment of damages to one Loring for land taken for public purposes by the town of Holden. The *Telegram*, in commenting upon the case, said: "The town offered Loring \$80 at the time of the taking, but he demanded \$250, and, not getting it, went to law."

Words to the same effect were also published by the *Gazette*. These came to the notice of the presiding justice, who, of his own motion issued a summons in the name of the court to the managers of the papers, to show cause why the corporations should not be punished for contempt of court. Upon their appearance and after hearing, a fine of \$100 was imposed upon each corporation. The cases were taken up by writs of error and the judgments affirmed. A number of questions of practice were disposed of, and it was held that the publications tended to obstruct justice and prevent a fair trial, and so constituted contempts of court. That evidence of such an attempt to compromise would be inadmissible, is obvious. It is equally clear that if these facts came to the knowledge of the jurors,



they would have a tendency to prejudice them against the plaintiff, while the very fact that the publications came to the attention of the judge, was evidence of the probability of their reaching the jurors, and of their capacity for mischief.

It was held, too, that an execution was a proper way by which to reach the corporations' property, in case the fines were not willingly paid.

In the same State, and at about the same time, Torrey G. Wardner, the editor of the *Boston Traveler*, was convicted of contempt and imprisoned for publishing serious reflections upon the conduct of the trial of D. W. Getchell, an engineer of the N. Y., N. H. & H. R. R. Co., who was convicted of manslaughter for causing the accident at Sharon Station, whereby several passengers lost their lives.

Threats of an appeal were made, but acting under the advice of friends and counsel, Wardner apologized, purged himself of the contempt, and was released.

I have thus called attention, though with no attempt at an exhaustive statement of all the problems solved or to be solved, to the safeguards which surround the constitutional right of the press to freedom, as well as the limitations upon the abuse of that freedom and its degeneration into license. These, in turn, constitute the safeguards of the freedom of individual character and reputation, and of the free and unimpeded exercise of their proper functions by the judicial, executive and legislative departments of government.

This brief history of the newspaper before the law shows many extraordinary changes in their relations toward each other.

Macauley goes so far as to say: "No sooner had the press been emancipated from government censorship than the government itself fell under the censorship of the press."

Without quite conceding this, we have at last worked out a fairly satisfactory definition of that vague term "The Liberty of the Press"—so often and so unreasonably appealed to as a shield against responsibility for abuse and vituperation, and the language of Alexander Hamilton is both comprehensive and accurate when he says: "The liberty of the press consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects government, magistracy or individuals."

GEORGE D. WATROUS.

## THE INDETERMINATE SENTENCE.\*

If social science were not blinded by tradition nor hampered by custom, it would quickly establish the one right method of dealing with crime. Since every man's liberty is a sacred right, as far as it is consistent with the rights of his fellows, it would direct that no man be imprisoned unless it is clear that his freedom is dangerous to others, and that, when once imprisoned, no man be freed until the danger has ceased. This is the principle of what is inexactly called the indeterminate sentence. When society detects an enemy, let it restrain him until he is reconciled to it. The best explanations and criticisms of this principle, in its relations to psychology, to social philosophy and to the facts of experience, are found in the proceedings of the National Prison Association of the United States, especially in certain memorable addresses by Messrs. Z. R. Brockway and Eugene Smith of New York, by Mr. Charles Dudley Warner of Connecticut, and by Dr. Wines of Illinois. It is impossible within my limits to treat the several branches of the subject in detail, and I shall aim simply to sum up the results established by the discussion, and to give some indication of the possible future development of the principle.

The traditional custom is to define by law the several acts constituting crimes and to attach to each a penalty with some reference to the supposed guilt which it reveals. The crude and terrible penal codes of our ancestors prescribed death for every felonious act; but of minor offenders some forfeited their land or goods, others were banished, or suffered some bodily mutilation, or were sent to the pillory or the whipping-post. Prisons were at first regarded almost exclusively as places for securely detaining the accused until trial, and the convict until punishment. But as men grew more humane, or at least more refined, the infliction of death and of all forms of torture became distasteful and rare; and imprisonment for specified terms was gradually substituted. This change, the result of sentiment and convenience, and not at all of any reasoned conviction that confinement serves a better purpose, is now almost complete and universal. Our penal codes assign imprisonment as a penalty

---

\* This article contains the substance of an address to the National Prison Association of the United States, at its Annual Meeting in Hartford, September 25, 1899.

for nearly every act they forbid, but by specifying a maximum and a minimum term, leave it to the trial judge to fix the duration of imprisonment within these limits according to his view of the criminal's deserts.

This system has often been exposed as absurd in principle and as grossly wrong and injurious in practice. It is founded on the false notion that the state can and ought to apportion retribution for offenses. It requires of every criminal judge an utter impossibility, and results in gross and startling inequalities whenever an attempt is made to apply it. Nor does it effectively promote the sole end of criminal law, the protection of society. There are but two conceivable ways of protecting the community against its enemy, the criminal; to disarm him or to reconcile him. But the time sentence does neither. It restrains him until the term ends, as if one should cage a man-eating tiger for a month or a year, and then turn him loose. There is nothing in such a sentence which tends to reconcile him to his fellows. It commonly aims at nothing more than to restrain him and hold him safely for the term, and in most cases he is discharged more the foe of mankind than before.

This terrible indictment of the penal code in its traditional form has never been answered. It admits of no answer, and while many jurists and legislators still cling to the notion of graduated penalties, and strive in vain to develop it in harmonious systems of laws, while it defaces our statute-books, and its administration disgraces our courts, misnamed halls of justice, no intelligent man ventures to defend it as a principle. Its frightful inequalities, its tangled absurdities, its misleading and pernicious influence on the popular mind, would but be made more conspicuous and repulsive by any candid apologist. The method of apportioning penalties according to the degrees of guilt implied by defined offenses is as completely discredited, and is as incapable of a part in any reasoned system of social organization, as is the practice of astrology or the police against witchcraft. It holds its place merely by the tenacity of custom and the inertia of opinion controlled by tradition. The origin of it was the native impulse to return evil for evil. Every brute and every man whose nature is brutal seeks instinctively to hurt those who hurt him, and the notion of retributive justice in all its forms is but the development of this crude instinct. The satisfaction of this sentiment by inflicting punishments proportioned to our estimate of guilt is no more rational than the satisfaction of the rattlesnake in biting the stick which strikes him. The thirst of the human animal for vengeance, when it actuates a whole community, and is expressed in law and executed by judicial tribunals, is dis-

guised, indeed; its coarseness is mitigated, and the disturbance of civil order by private feuds is avoided. But any penal code which attempts to inflict penalties commensurate with offenses has this passion for its inspiration and its source; and is but organized lynch law. The character of the act is not changed by the numbers who commit it, and the community which deliberately injures a man because he has offended is at least as brutal and irrational as the man or the beast who impulsively avenges a wrong. The entire abandonment of retribution as a motive is the first condition of a civilized criminal jurisprudence.

It follows, if prisons are to be used at all, that it must be because they are necessary to protect society, that is, either to disarm its enemy, the criminal, or to reconcile him. If he cannot with safety to others enjoy his freedom, he must be confined and prevented from practicing crime. There is no other justification for confining him. This principle determines at once the nature and duration of the confinement. The restraint must be just what is necessary to control him, every feature of it must be directed so as to prepare him, if possible, for freedom, and it must last just as long as he is unfit to be free. Let society hold its enemy in duress until he ceases to be its enemy. This rule protects the community and furnishes to the criminal the motive for adjusting himself to its order. The prisoner becomes the arbiter of his own fate. He carries the key of his prison in his own pocket. There is ever before him the definite alternative, to frame his life and character according to law and duty and go forth a free man among his fellows, or to cherish his rebellious temper and vile instincts and remain in durance. Hour by hour, night and day, the sense that he must work out his own destiny grows upon him. The strongest motive known to human nature gradually comes to inspire his daily thoughts and efforts. If he has in him a capacity, however dulled or obscured, for manly exertion, foresight, ambition, it is aroused and developed. An enslaved people rising against oppressors, and fighting to the death for freedom, is esteemed a noble theme for eloquence and song; and not less inspiring to every lover of mankind is a band of prisoned convicts, whose hearts and lives have once been wasted and trodden by evil passions and brutal impulses, now struggling to put down these tyrants and win back for themselves the free light and air of manhood and of heaven. When liberty is thus achieved, it will be valued indeed and will not lightly be lost again.

But a new and noble motive does not suddenly become dominant in any character, least of all when it must reverse the habits of a

life. The convict is commonly defective in mind, often in body; and his particular defects must be studied by those who would supply or remove them. That this may often be done, to an extent that must amaze the most sanguine believer in humanity, has been proved in a thousand instances, but it is a work calling for trained intelligence, unwearied effort, and a patience almost divine. The principle of the reformatory sentence, in its completeness, implies the conversion of the prison into an institution combining the means and aims of hospital, school and church, for the healing and culture of body, mind and will. Unattainable as is this ideal, and impracticable as the suggestion of it may seem, it is to be held in view as the standard by which our partial and tentative reforms must be measured; and just in the degree that it is approached will the possible beneficence of the principle be realized.

One defect which is so common as to be almost characteristic of the convict, is the want of skill and training in any honest pursuit. If he is sent out into the world in this condition, he is under fearful pressure to return to crime, the only trade he knows; and it is too much to hope that any prison-born purpose or conviction will long sustain him against it. Yet the state is daily turning loose men whom it has held as wards for years, without giving a thought to their industrial education. Whatever employment it gives the prisoners is contrived and carried on solely for its immediate pecuniary results, or else with the political end of satisfying the demagogues who misrepresent and disgrace "organized labor." Not a tithe of the convicts discharged from such imprisonment are able to support themselves by work. But under the reformatory sentence, the prisoner is trained in the employment for which he is found most competent, and is released on trial, only when a self-supporting engagement is secured for him.

It is obvious that such a system as this revolutionizes the relations of the prisoner to all the agents of society who deal with him. Their aim is no longer to hold him securely in subjection, as the mere slave of the state, during the allotted term, then to be discharged of all responsibility for him, but they have before them the definite purpose to prepare him for freedom. The spirit of the institution undergoes a wonderful change when the reformatory idea supplants that of punishment. The prison of the old style faces the past, and forever looks backward to the crimes committed, of which the sentences awarded are a perpetual reminder. The true reformatory has turned to the future, and hears "a trumpet in the distance pealing news of better." On the one is inscribed, "Leave hope behind, all ye that enter here!" On the other, "Never

despair! Seek, and ye shall find. Knock and it shall be opened unto you."

It is doubtless true, as far as we can judge, that there are some natures too degraded, usually too deformed, to be controlled by such motives and influences; criminals by constitution or inveterate habit, who can never be fitted for free social life. If so, no good can come of turning them loose. The only proper disposition of such men is to keep them permanently under restraint. The habitual criminal demands far more careful study than has been given him, and the responsibility of society for his existence, and the pernicious methods commonly practiced in dealing with him, deserve a full examination. It is the damning reproach of our traditional penal system that it produces and perpetuates in the midst of our civilization a body of professional criminals, a large class of hopeless degenerates. But for the moment I can only refer to them in connection with the principle of the reformatory sentence. Under the old penal codes, such human brutes and vermin are confined for fixed terms, long or short, according to the offenses which happen to be legally traced to them, and are then set free to plague the community until detected in other crimes. Nothing but universal custom could blind us to the folly of such a practice. Let them be confined until fit for liberty. Not that any man must be declared irreclaimable. Set before everyone, however depraved, the hope, if he can embrace it, of reforming his own character and life, and thus opening his prison doors, but let none free until he can be trusted with freedom.

The principle of the reformatory sentence, then, is fully established. If imprisonment for crime is to be practiced, it is demonstrable that the only rational and useful form for it is under sentences terminable always and only by the prisoner's own recovery from that in him which has made it necessary. Why is this form of imprisonment not universal? Here we are confronted by all the forces of a narrow and timid conservatism. The argument for the complete reform of criminal legislation on this basis is not refuted. But against every practical step which is taken or proposed in this direction objections are heard. Perverse custom and traditional prejudice voice themselves in criticisms of detail, from minds incapable of grasping the system as a whole. It is necessary to meet such objections point by point, and by persistent reiteration of truths already familiar, to eradicate false habits of thought, and elevate the public mind to a scientific and consistent view of the duty of society to itself. I shall, therefore, state and examine very briefly, but as strongly and clearly as I can, each of the reasons

which have been avowed for resisting, denouncing or reversing the measures of reform in our criminal jurisprudence inspired by the principle of reformatory imprisonment.

A frequent protest is against the favor which this system shows to criminals. The Elmira Reformatory, itself the creation of Mr. Brockway and the scene of his imperishable achievement, at once in rescuing regiments of men from social and moral ruin, and in awakening to new life the intellect and the conscience of the world in its dealings with its neediest wards, is among existing institutions the nearest approach to a prison upon the reformatory plan. The legislation which established and maintains it, in the light of a true prison science, is but a halting and half-hearted compromise with antiquated and barbarous traditions. But in contrast with the older and usual methods, it represents the foremost practical wisdom of the age. It studies the physical, intellectual and moral defects which mark its inmates and which have brought them there, and seeks to remove these by enforcing cleanliness, education and habits of truth, self-control and industry. It teaches useful occupations, suggests motives to exertion, awakens the mind to a sense of social relations and duties, and holds ever before the prisoner the sweet prospect of self-earned freedom, and self-asserted manhood. "What?" cries the objector in horror; "shall the criminal be rewarded for his cruelty, his dishonesty, his lust, by opportunities and resources such as the free and deserving laborer cannot command? Are not the bath, the school, the workshop given to these outcasts a premium on crime?" The same outcry was made centuries ago, when the greatest of all reformers became known as the friend of sinners, and his reply is ours: "They that be whole need not a physician, but they that are sick." Though it be true that the fatted calf is killed for the prodigal, yet the complaint and sneer of the elder brother meet a divine reproof.

But the state is not instituted for the exercise of Christian philanthropy. Justice and rational expediency must guide it. By what right can it tax the poor to give to criminals privileges which the poor cannot command? If the state is bound to secure to every man what he deserves, this objection is conclusive. In that case, there are countless guilty wretches both in prisons and out of them, who may with strong probability be held to merit nothing better than the Newgate and Bridewell of John Howard a century ago, or the worst county jail of to-day, with their horrible filth and exposure to physical and moral contagion. But the most consistent champion of distributive justice towards crime will hardly plead for this form of it. Even he will admit that the maintenance of such abodes

for outcasts is a flagrant breach of the duty of society to itself; that the community has no right to poison and corrupt the bodies and souls of those of whom it takes charge, whatever their deserts may be. This admission concedes, in principle, all that we ask. The state must not set up a blasphemous parody of the divine judgment seat, and assume to doom each man as he deserves. It is the agent of society to preserve civil order and protect persons and property; and, to do this, it must restrain the lawbreaker or reform him. The question for the statesman is, how can such restraint or reformation be secured most efficiently and most cheaply? Reformation, when possible, is vastly more profitable than restraint. To ascertain when it is possible, and in such cases to effect it, there is imperative need of all the apparatus of opportunity and privilege which has been described, though combined with the most rigid discipline.

In fact, this discipline makes the reformatory terrible to the convict, and the requirements of personal decency, persistent labor and regular study, so far from being enjoyed as luxuries, are perpetual afflictions to him, until his lawless habits and passions are overcome. It is notorious that criminals as a class dread the reformatory more than the worst of the antiquated prisons. Were their inclinations and comfort consulted, none of the costly privileges which are represented as boons to them would be provided. But the gate of restoration for the convict is in every sense strait, and his way is narrow. The keenest suffering that can be inflicted on the criminal is to break up his crust of stolid indifference, and open his soul to its degradation. The agony of humiliation felt by the man struggling to escape from his dreadful past and his baser self is a penalty more bitter than all physical privations or blows. Ask the objector whether any degree of poverty or neglect would tempt him to exchange his life for that of the convict whom he regards as petted and fondled in luxury, and if he answers yes, tell him that the felon's cell is the place for him.

But of late years another style of protest is more common. Much is heard of the intolerable cruelty of our system. Even among those who suppose themselves to be enlightened advocates of reformatory methods, there are many who refuse to accept the principle as universal. No legislature has ever yet enacted the indeterminate sentence without qualification for all cases. Let a man be imprisoned for a minor offense, for which the old codes prescribed a term of six months or a year, might he not fail to earn his release, and so remain permanently in durance? Would not the possibility arise of such frightful injustice as confinement for life,



where the laws and the common judgment of mankind have awarded but a short imprisonment? This apprehension has led, in almost every statute authorizing a reformatory sentence, to a provision for the maximum term, fixed by the old retributory code; at the end of which the prisoner must be freed, however certain it be that he will plunge at once into crime. The charge of cruelty justly lies, not against the sentence which would restrain him, but against that which would dismiss him to his ruin and to the damage of mankind. The criticism is founded on the false notion that his confinement is a punishment for his offense. Unless the conception of penalty and the thought of any relation or proportion between it and the crime is utterly abandoned, no right thinking on the subject is possible. As long as a man cannot be at large with safety to himself and others, he must be restrained. This is the dictate of mercy itself, and the particular act which has first disclosed to the community his character and its danger, has no bearing whatever upon the question. It is the interests of society and of the convict for the future, and not their memories of the past, which are to be conserved.

The stronghold of the opposition to rational imprisonment, however, is found in a third question. How can the indeterminate sentence be made determinate? Who can administer it aright? Where is the wisdom, the knowledge of hearts, the power to read character, the insight into motive, sincerity, strength of will, the eye to pierce all disguises, to detect hypocrisy, to recognize manliness, to distinguish conscience and honest purpose from pretense and cunning? Who is equal to these things, and what mere man will dare to assume the dread responsibility, and upon his own judgment of his fellow's nature decide his doom? I confess that the decision when to terminate the indeterminate sentence, in each individual case, is one of the most difficult which can be imposed on the human mind. To make it always without error is not in the power of any man or body of men. The reformatory method with criminals will never be administered without errors, and such errors must work hardships. The felon of strong mind and deep cunning may impose on experienced keepers; the defective man of unbridled passions may impress them deeply with his moral worth during a crisis of repentance; while the really hopeful aspirant for manhood may stumble and fall countless times in his efforts; and thus the less worthy may often obtain the earliest release. The force of the objection must be admitted without reserve. It is a fearful necessity that is thrown upon the state to exercise such a prerogative through fallible agents.

But it cannot be too emphatically asserted that the objection is not to the indeterminate sentence as a method, but to every method of restraining criminals. If imprisonment must be practiced, somebody must be vested with the power to decide who shall be imprisoned and how long. Assuming the necessity of the restraint, human minds capable of error must assign and administer it. Observe, then, that the objection in question applies with a thousand fold more force to the traditional system of retribution than to the scientific system of reformation. If students of humanity trained in the work of searching the character, stimulating the better motives, and watching for the growth of responsibility and conscience, who are in daily, hourly intercourse with their wards for the sole purpose of preparing them to be free, may still be deceived in them, what shall we say of the judge, who sees the prisoner for an hour or a day at his bar, and whose knowledge of him is carefully limited to the single act of which he is accused? The more familiar we are with the practical work of penal jurisprudence, the more irresistibly shall we conclude that, while the difficulty of fair and effective administration will always be felt under any system of law, that difficulty amounts to utter impossibility under the current system of retribution; and is indefinitely diminished under the reformatory plan. Thus the objection so often urged against the indeterminate sentence and its corollaries, becomes, when candidly examined, an unanswerable plea for its adoption.

But while this is true without reserve, while the amount of hardship, of needless suffering, of unequal and oppressive restraint, inflicted on convicts by the caprice, ignorance and error of judicial tribunals, would be vastly reduced by the immediate and universal adoption of the general reformatory sentence, it remains true that the machinery for its proper administration hardly exists, and that the men fit to be entrusted with it are extremely rare. This machinery and these men have yet to be produced. In the moral and in the intellectual world, as in the physical, it is the demand which brings the supply. When the war for the Union began there was not in the United States a general who had shown his ability to command a modern army. The nation experimented with those who promised well, trained the best of them to their utmost capacity, and eliminated the failures, until it had a noble and effective military hierarchy, unequalled in the world. Twenty-five years ago there was not on earth a man who could construct a marine engine, a telephone, a boot-machine or a rifle which would to-day be fit for use; now there are hundreds of thousands. Let the officers of state in charge of prisons cease to have it for their aim to

keep the convicts in subjection and to terrorize them into a semblance of order during foredetermined periods; let them be selected for the one work of understanding these men and preparing them for freedom, and then trained day by day in the varied and absorbing duties which the work implies; and they will become as superior to their predecessors in effective influence for good and in discernment of genuine results, as the code of Christian brotherhood is superior in moral dignity to the barbarous code of revenge.

An appeal is sometimes made to technical limitations of constitutional law, in order to show that the indefinite sentence is impossible under our form of government. Without reviewing the opinion once given by the Supreme Court of Michigan against the constitutionality of the method, or the more recent decisions of the courts in six or seven other states affirming its constitutionality, it is enough now to say that the doubts long entertained on this question by a part of the legal profession have given way to a substantially unanimous conviction that there is no validity in the objection. The overwhelming weight of judicial opinion holds that the legislature may assign to offenses precise and unvarying penalties, or may leave to the courts full discretion to fix them, with or without specified limits; and with or without conditions; that the pardoning power, even if constitutionally vested in the chief executive alone, is in no respect qualified or impaired by authorizing other officers to ascertain when any conditions thus imposed are fulfilled; that in short such determinations and the consequent release of the convict, are the execution of such a sentence and not an infringement of it. These principles are now so fully established that the rather technical quibbling which has occasionally been heard against them would require no mention, but for the momentous fact, which must not be concealed or evaded, that the savage theory of retribution has for generations controlled and shaped, not only the thoughts of men in relation to crime, but our systems of penal law and in some degree our written constitutions themselves, and long before the reconstruction of criminal jurisprudence on true principles can be completed, the reform will come into severe conflict with the forces of time-honored prejudice and narrow conservatism entrenched in these strongholds. Let me frankly say, then, that while the timid beginnings of legislation in the direction of science and humanity which have been obtained in eight or ten states of the Union, providing for partial and imperfect experiments in reformatory imprisonment, have in no case gone further than our constitutions permit, or than the body of intelligent public opinion will sanction, yet these are but the beginnings of a revolution

which is destined radically to change men's habits of thought concerning crime, and the attitude of society towards criminals, to rewrite from end to end every penal code in Christendom, and to modify and ennoble the fundamental law of every state.

The objections which have been discussed are of course presented by different minds in widely varied aspects and language, but I have tried to exhibit with perfect candor the full strength of each of them, and believe the answer given to each to be in principle conclusive. The result of the whole discussion is that prisons have no use in the social economy, except for the single purpose of confining men unfit for freedom; that convicts can never be rightfully imprisoned except upon proof that it is unsafe for themselves and for society to leave them free, and when confined can never be rightfully released until they show themselves fit for membership in a free community. The laws of nature and of humanity in their universality are terrible to our weakness and narrowness. The most progressive spirit of reform hobbles lamely after their majestic sweep.

In the light of this clear and demonstrated principle all that prison science has accomplished in the last generation towards the construction of a rational jurisprudence of crime is indeed but little. Nor can it be more than a beginning, more than a timid, halting and inconsistent compromise with the dreadful past of prison history, until public opinion rises to a broad appreciation of the problem, and, with the full courage of its convictions, demands their incorporation into the law of the land. We have beaten about and about the question, handling fragments of it, with timid apprehension lest we are going too far in telling bits of the truth, and never yet daring to defy the savage spirit of retribution in every form and in every application. To illustrate this, let me remind you of the weak and inconsistent questioning heard to this day among avowed advocates of reform, whether the reformatory sentence is practicable for misdemeanants. What is the difficulty? Is it not simply in the doubt whether they have done anything which deserves a confinement long enough to change and establish character? But what is this, but to fall back in our reasoning upon the discarded, absurd and impossible standard of desert? That is, to abandon our principles entirely, and to reforge the fetters of our minds which we have broken? To the sound social thinker there are no degrees in crime, there are only grades of character. To classify men by the individual acts proved against them as misdemeanants and felons, and deal with them on radically different methods, is but to make of the state a great engine, first, for turn-

ing misdemeanants into felons, and then for struggling to undo its work. For every student of our penal administration knows well that the criminal class is, generation after generation, the continual product of our social system, and that the most potent agency in its production is our method of dealing with what are called petty offenses, with our apparatus of county jails, police courts and short sentences. Unless this be swept away, we are making more mischief than our best reformatories can cure. We see that the reformatory sentence is the only hopeful treatment of the felon; but there is something nobler and more useful than the most perfect measures for the reformation of ten felons; it is the measure which shall prevent one man from becoming a felon.

This thought leads at once to the larger aspects of our subject. The fundamental principle on which the indefinite sentence rests, the corner stone of the fabric of rational jurisprudence, is that no man should be imprisoned if it is safe for himself and for society that he be free. Not merely is freedom a natural and universal right, the privation of which requires an extreme justification, no less than necessity, but it is always true that imprisonment, next to death, is the last, unworthiest use for manhood. Prison life is unnatural, at its best. Man is a social creature. Confinement tends to lower his consciousness of dignity and responsibility, to weaken the motives which govern his relations to his race, to impair the foundations of character and unfit him for independent life. To consign a man to prison is commonly to enroll him in the criminal class. This tendency is enforced and made irresistible by the conditions, discipline and associations of our common jails. When for these are substituted the best methods of reformatory training, experience shows that the evil influences of imprisonment may be largely mitigated, and that large numbers of inmates have a purgatory instead of hell. But as long as men are born for freedom and for social life, the most perfect prison on earth will be but a pest-house furnished with the best appliances to combat and cure in the individual the destructive plague which itself cherishes and perpetuates in the multitude.

With all the solemnity and emphasis of which I am capable, I utter the profound conviction, after twenty years of constant study of our prison population, that more than nine-tenths of them ought never to have been confined. They are there in reality because a careless, indifferent, impatient community has not known what else to do with them, and has found it convenient thus to put them out of its sight. For the moment they and we are safe, and we can forget them in our buying and selling, in our golf and tennis. But

each devil thus cast out soon comes back to us, with seven other devils worse than himself, and a recruit is made for the army of enemies of mankind. The highest reform of the criminal law is in finding other methods of dealing with offenders. In all but extreme cases of depravity, what is needed with the youth beginning a lawless career, is that the social motives in him be awakened and strengthened, that the habit of foresight, the sense of responsibility, the regard for the esteem of his fellows, the sympathy with mankind, be aroused to constant action. It is in the social life of the community that this work can properly be done. To learn to swim without touching the water is easy and natural, compared with learning to live as a member of a free community while immured in prison walls.

Partial and incipient expressions of this principle are the custom of suspending sentence, now authorized by many states, the probation law of Massachusetts, and above all the deep stirrings of mind and conscience among students of criminal science everywhere, all looking to the limiting of the practice of imprisonment within bounds far narrower than any of us have as yet dared to define. As an embryo civilization grows towards its birth, the time will surely come when the moral mutilations of fixed terms of imprisonment will seem as barbarous and antiquated as the ear-lobbing, nose-slitting and hand-amputations of a century ago. The nature which shows an inclination to lawlessness will be studied and thoughtfully, kindly, patiently brought under social and moral influences such as a true human brotherhood can exert; only the obstinately rebellious or dangerous characters will be confined, and then moulded, as far as possible, into harmony with society; while the irreclaimable will be permanently secluded from all opportunity to work mischief to others or to reproduce their kind. The extinction of the criminal class and the ultimate abolition of prisons are the ideals to be kept in view; just as the elimination of disease must be the perpetual aim of medical science.

I am painfully conscious that in this hasty outline of a great social truth which is but beginning a revolution in the dark places of earth, so long full of the habitations of cruelty, I have failed even to suggest its vast scope, the infinite detail of the prospect it opens, and the multiplied beneficence of its promise for humanity. It is as if one should attempt, with black crayon, under dim light, to sketch the rising sun. I know also how a brief essay, the abstract of a discussion which would fill many volumes, takes an unseemly air of dogmatism, and a tone abrupt, aggressive and uncompromising. Still worse, the clash with thoughts and habits rooted for

generations in the minds, practices and laws of every nation, provokes the scorn with which custom and experience always face bare, unvarnished declarations of novel principles. "These be dreams and visions," cries worldly wisdom; "fine theories without a practical meaning; but while human nature remains, anger and greed will burst into crime, and crime will demand repression and punishment."

This clamor against ideas, principles and demonstrable truths, in the name of practical intelligence, is the perpetual brake upon the wheels of progress; and requires me to add, once for all, that there is no longer anything merely speculative or experimental in the methods we advocate, but they have already vindicated their value to the utmost extent of sanguine hope, wherever even tentatively and timidly applied. There are thousands of useful citizens among us who have been rescued from criminal life by their reformatory influences; and each of these conclusive proofs of their power is accessible to the sincere inquirer. The statistical records of half a score of improved prisons, after every allowance for their imperfection, establish the general fact, that the great majority of inmates who earn an honorable discharge from them are as sure to do well in after life as a greater majority of those released after fixed terms of confinement, under the traditional system, are sure to return to crime. Above all, the unanimous testimony of every governor and warden who has devoted himself to the work of saving men by these methods, is that even the condemned felon has in him, more often than not, the making of a law-abiding man and citizen, if only the state will seek to raise him, instead of crushing him. In short, the world of criminal jurisprudence is already astir; less with the general principles than with the accomplished facts of reformatory discipline. He whose mind is open to these facts will not dare denounce as mere theory the promise of science and the laws of human nature.

CHARLTON T. LEWIS.

## EVOLUTIONS FROM RADICALISM TO CONSERVATISM IN THE HISTORY OF AMERICAN POLITICAL PARTIES.\*

A comparison of the history of parties and their relation to political progress in Europe and America reveals three distinct lines of development. In England there have long been two clearly defined parties, the one always conservative, the other always advocating more or less radical measures. Political progress has been attained through an alternation in power between the two. When conservatism has become oppressive the Liberals have been called into office to introduce the needed measures of relief. When radicalism has gone too far, the Conservatives have been restored. Liberalism has extorted progress from the Conservatives, Toryism has held in check the Radicals. On the Continent, in most countries, there is a similar opposition of radical and conservative forces. Here, too, progress has been attained through the oscillation of power. But instead of two well defined parties there are many. Occasionally some issue divides the numerous groups into two opposing camps, one radical, one conservative. The pressure over, the conservatives fall apart into two or more sections; the radicals split up even more minutely. In the United States, there have been, as in England, only two important parties. But neither is radical. There is no clear cut opposition of progressive and conservative forces. Both parties have been radical and have become conservative. Progress has come through a series of radical movements, every step being taken by a new party. The step taken, the party becomes conservative. The next great onward impulse must create for itself a new radical party, drawn from the ranks of both the old.

The different forces and conditions which have caused this variation are easily distinguished on a closer examination. A knowledge of them is necessary for a clear understanding of the history and tendencies of our own political parties.

The normal development of parties under a republican government is seen in England. The Tories and Whigs of the last century, the Conservatives and Liberals of the present are the natural outgrowths of a parliamentary system. The logical course for political factions out of power is to unite into an organized opposition. For

---

\* Copyright, 1899, by the Kingsley Trust Association of New Haven.



those which are in, more especially under a system of ministerial responsibility, the best mode of defense is to join hands and stand or fall together. The Ins and the Outs, the Government and the Opposition, thus force each other to make compact organizations. Inasmuch as in an established political system there is always conflict between those who favor things as they are and those who wish for change, it is natural that the conservatives should be attracted to one of the parties and the forces of progress to the other. The conservative party is a homogeneous one; there is but one way of standing still. The radical party is made up of factions which tend to fly apart; the paths of progress are many. But if there is such general satisfaction with the established order that the conservative forces are too strong to be routed by any but a combined attack, and there are common principles of progress luring enough to draw together the forces of change, all minor differences laid one side, this tendency is held in check. When the radicals are in power fear of the opposition and of a conservative reaction will keep them together and weigh against rash steps. Desire to regain control will impel the conservatives to become more progressive. Excess on either side will start back the pendulum of power. Such has been the history of parties in England. There has been at all times a powerful body well content with existing institutions and opposed to all change. There have been, on the other hand, frequent calls for reform, urgent enough to unite and give victory to the radicals. In the early century, the popular demand for an extended suffrage brought the Liberals into power and the Reform Bill was passed. Not wise enough to stop here they began an attack on the Church, the House of Lords and other established institutions. Fear of the destructive tendencies of the radicals caused a reaction in 1842 and the establishment of a strong conservative party under Peel. Four years later the Liberals again triumphed, united this time in the struggle for free trade and the repeal of the Corn Laws. The defeat of the previous election had had its effect on them and fear of another overturn restrained their radicalism and held them well together during the next twenty years of power. Then under the influence of Gladstone more extreme doctrines began to prevail. Old institutions were again violently assailed and the new radical policy was sternly rebuked by a temporary triumph of the opposition. The Conservatives had by this time learned that to keep their grasp on the reins they must be progressive. When the Liberals were returned to power at the next election they had not yet learned to be cautious and in 1886 their extreme attitude in favor of Home Rule, Disestablishment and the Local Veto caused another reaction.

Again the Conservatives showed the effect of Liberal influence and passed important measures for the relief of rural working classes and for educational reform. Another change in power took place six years later and again at the last election the pendulum swung strongly to the conservative side. Thus throughout the century each of the parties has been united and well defined. No third party has acquired any strength. The Liberal Unionism of late years is but a new name for a wing of conservative proselytes. The conservative party has been strong enough to force the radical forces to unite, and to prevent the passage of extreme measures. The Liberals have had great common principles for which they could fight as one body. They have forced the Conservatives to be so progressive that much of the real reform of the century has come from that party.

This normal tendency is not confined to England. In Canada, for instance, the Conservatives and Liberals have alternately controlled the government; the Liberals having recently come into power after eighteen years of Conservative control. There are examples, too, on the Continent. Belgium until very recently has had but two parties. The alternation in power is well shown in the recent movement for a change from a highly restricted to a universal suffrage. The agitation for this reform brought the Liberals into control, and the changes were effected. Elated with this success they began a vigorous attack on the clerical power. In this they went too far and the first result of the reform was a decisive conservative victory. In the Netherlands, Liberals and Conservatives have alternated for half a century, their contests centering largely around religious issues. In 1883 the Liberals who of late years have in the main prevailed, were defeated on a too radical proposal for an extension of the suffrage. The Conservative party, to hold the power it had gained, saw itself forced to move on a step and amend the constitution to meet the demands for reform. New issues in a few years brought the Liberals again into control. In Norway also there are two well formed parties. The radicals are seeking to attain a separate consular and diplomatic service, the conservatives looking only for equal representation with Sweden. The situation here is complicated by the fact that the radicals are striving not only against the conservatives, but against strong opposition in Sweden. On the whole, however, here, as in the other instances mentioned, the same tendency is seen as in England.

On the Continent these normal conditions are seriously modified by other forces. In general the same cause and the same results exist everywhere. The characteristic political force which has

swayed all the Continental nations of late years is a widespread and profound dissatisfaction with the existing systems of government. There is, furthermore, as a recent writer\* has pointed out, no "common consensus of opinion" as to what is the best form of government. There has been neither a common and abiding faith in existing political institutions nor any general agreement as to what should be substituted for them. In some nations this has resulted in revolutions and counter-revolutions, radical democracies and monarchical reactions. One government has been tried after another and even yet there are strong parties entirely opposed to the existing order of things. In some states, even among those who are satisfied with the outward form, there is a bitter conflict over the balance of power between social classes or different races ill mixed under one flag. In different ways this one common characteristic works through varying local conditions to produce the same result. Its effect is everywhere to emphasize the tendency of the radical forces to fly apart, a tendency which under normal conditions is held in check by the existence of a strong conservative opposition and an enthusiasm for some common principles of progress. The result is that instead of two well defined parties there are a number of indistinct ones, often a dozen or more small and scarcely distinguishable groups. Wherever, on the other hand, this common characteristic is not present and there is a general acceptance of and faith in the fundamental political institutions of the country, there the tendency is universally found to make towards two parties. There is an apparent exception to this rule in Switzerland, where there is a third party, the Clericals. They are the extreme conservatives. The Center stands between the Right and Left, voting with the radicals on religious matters, in most others acting as conservatives. It must be remembered, however, that there is in fact no real party government in Switzerland. This is partly because the executive branch chosen by the Federal Council merely to execute its laws is by unwritten law non-partisan in character and so no party is responsible for the administration. Nor is any party responsible even for the legislation. By the Referendum each separate measure may be brought before the people. The constituent can thus vote on the individual laws and is not confined as under other systems to an endorsement or rejection of a whole party policy. Often a member is returned to the Assembly, although the measures which he favored are rejected by his constituents. The

---

\* A. L. Lowell, to whose excellent work on Governments and Parties in Continental Europe I am much indebted.

vote for representatives is entirely for men, not for measures. Local considerations and personal qualifications prevail and no organization of office seekers, on the basis of a national program, is possible. There is little change in the political complexion of the Assembly from year to year. There are in Switzerland three distinct divisions of opinion rather than parties. In so far as there are parties, the third element is the Clerical and its existence is due to lack of agreement as to the fundamental relations of Church and State. It is true, also, that in Belgium a strong third party of socialists has lately sprung up, and that recent years have shown a marked tendency in England for the radicals to break up into groups. The Socialists in Belgium are largely absorbing the Liberal party. If the movement grows in strength, the conservative Liberals will probably join with their old foes in common opposition to the new radicalism, and the tendency is towards an eventual redistribution into two parties. However, the socialistic movement in Belgium, as well as in Switzerland and Great Britain, may be considered indicative of a growing disagreement with present fundamental theories of the functions of government. If this view proves correct, such disagreement may result in these countries as elsewhere, in the splitting of parties into groups. In England, on the whole, the present division in the Liberal ranks does not seem to be necessarily permanent. Any excess on the part of the Conservatives, any great need of reform, would undoubtedly reunite the radicals.

In France, where revolutions and counter-revolutions have marked the clash of radical and conservative forces and no form of government has for long held the approval of all or even a great part of the people, there is a hopeless subdivision of the parties. The Clericals, who are the logical conservatives, have until lately entered but little into the government of the Republic. They have been irreconcilable and reactionary rather than conservative. There has been no other large body of voters well enough satisfied with existing conditions to be opposed to all change. The radicals, with no strong conservative force to oppose them, have divided and subdivided, one faction favoring progress in one direction, one in another. The French are better theorizers than organizers and there is little coherence in their parties. Those who think together for the time being vote together and the government moves on by stepping from one coalition of groups to another, missing its footing on the average of once in less than nine months. It is true that the bureaux and committee systems in the Chamber of Deputies and the custom of Interpellations which weaken the Ministry's power and the requirement of a majority for election in the choice of depu-

ties, all tend to foster the existence of factions. Still the underlying reasons why there are many parties are that there is not enough agreement as to the political changes needed, to give any one opinion predominating influence, and that there is no conservative force to compel unity among the radicals. Recently the Clericals have grown more reconciled to the government and it is not unlikely that when they become entirely so, a strong conservative party may arise and a radical union in opposition be necessitated. In Italy nearly the same forces prevail. The Clericals, the natural conservatives, are not allowed to participate at all in the affairs of the Republic, which is not recognized by the Vatican. The result is that the radical forces have been left unopposed in the parliament. An apparently well marked division into Right and Left some thirty years ago, in the early days of Italian unity, was really a division of the radical forces. The real conservative influence existed outside of the government, opposing the unification of Italy. While accomplishing that object, the radicals clung pretty closely together. The nation once well established, the radicals were left to split into countless factions—no great mass of people being able to unite on any one national issue. Groups are not even formed for principles, as in France, but around leaders. A group has been likened to a free lance fighting on his own account at the head of his band of retainers. There is little faith or interest in the government, no widespread common principles of progress, local interests predominate over national, and the only united conservative party refuses to have anything to do with the government. In Spain there have been well nigh as radical and revolutionary changes in the whole order of government during the last century as in France. Here, too, there is no prevailing faith in the present system. On the one side are the Carlists, the reactionaries, looking for a change of dynasty, split into two factions. On the other side are four different types of Republicans, to say nothing of the Socialists, all opposed to the present monarchical institutions. All these are represented in the Cortes. Among those who really favor the existing system there are two quite well defined parties, radical and conservative, which have alternated in power. Among those who are satisfied the normal division of parties prevails. Those who would change the whole system of government and simply acquiesce in the present order,—the Carlists on the one side, the Republicans and Socialists on the other,—are divided into many groups.

In Germany and Austria the dissatisfaction with fundamental institutions is of a somewhat different order. There are, as elsewhere, large bodies of voters who are entirely opposed to the pres-

ent political system. Besides this, there is in Germany great dissatisfaction with social conditions and in Austria a perpetual desire to change the balance of power between the races. In German politics in the early days of Bismarck there was a conservative and a radical camp. The Fortschritt, or radical party, opposed the strong new government till Bismarck's success made him recognized as the popular champion of German unity. A portion of the party then became partially reconciled and the old conservatives split up. These four parties have multiplied to as many as thirteen at a recent election. This, it is true, may be in large part due to the fact that there is no real party government in Germany. The executive rules and the parties can simply legislate; that is, they can only criticise and direct, but not control the government. Nevertheless the great obstacles to party unity are general discontent, one faction wanting one change, one another, and the lack of social homogeneity. The conservative force in Germany to-day is making toward a military monarchy. If this tendency grows stronger it may be sufficient to outweigh the centrifugal forces of discontent and class hatred, and compel a union between all opposition factions. In Austria there is a slightly closer approximation to two parties. The conservatives are federalists, in favor of decentralization, not a real party, but a motley gathering of factions, which unite only in the common hatred of one another and desire to be allowed to draw farther apart. They are more truly reactionary than conservative, having little love for the existing order. On the other hand there are various groups of liberals favoring one form or another of closer constitutional union. They cannot agree as to what they want; the early party of Liberals having split up about 1879, after some twelve years of rule. The situation is complicated with conflicting race and religious interests. Over these factions the Emperor exerts practical control of public affairs.

An entirely different variation from the norm of party growth has been caused by the political forces at work in the United States. There is here the same tendency as in England to form two rival parties rather than numerous groups. There is, too, that general satisfaction with existing institutions which makes a strong conservative party possible and the lack of which has exaggerated the centrifugal tendencies of radical forces on the Continent. On the other hand the parties are held together not by enthusiasm for common principles as they have been in England, but by the strength of the organization. The result of these two sets of conditions is that peculiar arrangement of parties in which there is no opposition of radicals and conservatives. Both the great parties have been for

many years conservative. In their origin both were radical. Each wrought out its own reform and became conservative. This peculiarity is caused no doubt in large part by the fact that radicalism in general has found little footing in this country. Elsewhere the task of radicalism has been chiefly destructive, seeking to break down oligarchical institutions. The great radical steps in this country were taken before the adoption of the Constitution. Since then there have been no oligarchical institutions to destroy. The liberty which radicals of other nations have been striving for, we have long since attained. Our task has been not to tear down, but to build. Yet there are other characteristics of radicalism which have existed and might continue to exist here. Radicalism is not necessarily destructive. It stands for progress. Progress may and will in time be constructive. There have been times when our parties stood daring and determined for progress. A few years have slid by and the party once thorough-going and untrimming in its radicalism has become not only conservative, but cowardly. It fears and shuns all new issues. That political conditions have not left room for long and deep seated conflicts between radical and conservative principles in this country, that there are no thoroughly conservative aristocratic institutions to rouse radical ire and few great needs for reform, might well tend to make party feeling less intense; it does not explain why what radical forces there are are not grouped always in one party, why the party once of progress should at last come to a standstill and oppose all change. The distinction between radicalism and conservatism lies in the sphere of mind; some men are always for resting on their oars, some always for going ahead. It is natural, experience everywhere but in the United States has proved it almost inevitable, for the go-aheads to be in one camp politically and the keep-what-you've-gots in the other. Why is it then that here radicals and conservatives are hopelessly mixed, that a party cannot remain radical as elsewhere but must turn conservative?

Before examining the development of our parties in detail it will throw some light on this question to note a somewhat similar tendency in England in the recent history of the Liberal party. Up to the time of the Home Rule split in 1886, that party had been thoroughly radical. It stood for definite principles of thorough-going reform. Since then there has been a remarkable change. The Rosebery cabinet came into power in 1892 with a clear cut and positive radical program. Most of the proposed measures it failed to carry through and then gradually abandoned. Its policy grew weak and uncertain. When it went out of power it could scarce be

deemed worthy of the name of Liberal. Now, the party is without a program, without a principle. It has no great leader. It is vainly looking around for some unifying issue on which to swing back into power. The Salisbury government has had to face turbulent and difficult conditions in foreign politics. The old Liberal party under such circumstances would have been quick to find and seize some new issue. The present party cannot. Its old radical principles it has completely abandoned. It stands no longer for Home Rule or Disestablishment, its members fear to advocate the Local Veto. They differ from the Conservatives only in that they are an opposition. The original radical party urged strongly the abolishing of the House of Lords. Rosebery was only for weakening it by resisting its claims to a veto power. The Liberals, now, vaguely advocate a reform of the House of Lords; which so far as it means anything is a policy diametrically opposite to the original position of the Radicals. The weakness and timidity of the party is attributed to the lack of some strong common principle and of great leaders. No radical reform is so needed as to unite the progressive forces in an enthusiastic party. Yet how account for this sudden abandonment of the old principles and the reforms which once called forth such enthusiasm? What has caused this evolution from radicalism to conservatism? True, there has been a strong popular reaction against radical principles. But earlier Liberals did not entirely turn tail when the country voted against them.

We have already referred to the tendency in late years of the English parliament to break up into groups and said that it does not seem to be necessarily permanent. A new issue may create a new and united radical party. It is true on the other hand that these groups are still roughly united into two parties, a conservative and an opposition, held together by the force of organization. The opposition ceased to be radical under Rosebery. The ministry's majority was precarious, the groups had to be held together; to hold them together there must be conciliation and balancing of interests; extreme measures must be abandoned. The prime object came to be not to legislate but to stay in power. Love of party and office began to triumph over principle, organization over measures. Out of power, the evolution went on. Formerly great ideas and great leaders drew the party after them. To-day principles have lost their power to enthuse. There is no great leader to kindle devotion to himself or his cause. The party is seeking merely to regain power, not to effect definite reform. The Whip rules, he sacrifices everything to keeping the organization together. He dares not espouse warmly the cause of any one group for fear of



alienating another. So the party without a policy, without a leader, radical no longer, is merely an organization. The power of the Whip, of the organization, has risen above principles and leaders; the party once fearless and radical has become cautious and timid. Liberalism still exists in force among the people but not among the political leaders. Gladstone strove for ideas, his followers are fighting for the organization. In time some new and dazzling issue, some brilliant leader arousing anew the enthusiasm in political circles for old radical ideals, may cast into the shade the purposes and plans of the machine and the Liberal party become radical once more. Or, as is not unlikely, the Whip may prove too strong and the new issue or leader may have to create an entirely new party, as has been the way in America.

Another instructive example of the conservative influence of organization and the desire for power, is seen in the political position of the Magyars, the dominating race in Hungary. That they keep together in one well organized body is essential to their self preservation against the surrounding Slavs. Through long experience they have learned the secrets and value of organization. To maintain unity, a conservative policy has been found necessary. At first they took radical ground, bitterly opposing the compromise and the resulting compact of union with Austria brought about by Deak and his followers. They sat in Parliament as irreconcilables, the advocates of independence and decentralization. When, in the course of events, the Deak party went to pieces and the Left, consisting chiefly of the Magyars, could come into power if only they would accept the compact, they changed front under Tisza, were reconciled and though nominally liberal became in reality conservative. Previously they had stood strongly for local self government. Now they favor high centralization. As moderate conservatives they have since ruled, the only united party in Hungary, facing a divided opposition of mixed races. Power and unity have been necessary to the Magyars as a race. Quarrels and loss of power would mean destruction. Before this requirement of unity and the demand for power radicalism had to give way.

Nowhere, however, is this tendency so clearly illustrated as in the United States. This, in fact, is the chief cause of the peculiar history of our party life, wherein lines of radicalism and conservatism, though sometimes sharply drawn, are quickly obliterated. The American is swayed not so much by ideas and theories as by love of power. The control of the government is in the gift of the people; the conflict has been not so much how it shall be exercised as who of the people shall exercise it. Our politician cares little

for principle, much for office. Our political genius is not for thinking, it is for organization. Occasionally a great idea stirs us, a new party with a ringing platform leaps into being, the new idea is carried through or loses its attractiveness. Then the lust for office, the interests of organization, become again supreme. The party of progress turns towards its past and fears to choose any new path.

It is with the Democratic-Republican party of Jefferson that this tendency begins to be manifested. Parties before that, did not come under the peculiar influences which have moulded those which have followed. In the Colonies, from an early day, were Tories and Whigs, reflecting more or less accurately the divisions of opinion in the mother country. They were in no sense national organizations. The Whigs who brought on the Revolution were the first national party. Even here there was scarce a party in a modern sense, little common action, no organization, simply a similarity of opinion and feeling. So far as it may be called a party it was strongly radical. Its aim was to resist the burdens of oppressive taxes and the policy of more and more centralized control attempted by England. War was not in its original program. The Revolution was the unforeseen end of its plans and policy. The aim of the Whigs accomplished, they ceased to be a party. Their radicalism culminated in war; that over, it came to a standstill. It had been in no sense a constructive party. It did not now try to govern or to build; it did not become conservative; it went to pieces. Radicalism had nothing to offer for the future. The forces of repudiation and anarchy were left alone in the field. Things went from bad to worse until very necessity of self preservation caused a strong reaction. The forces of order drew together in a vigorous conservative movement. From this common impulse sprang the great conservative Federalist party, destined to bind together the scattering fragments of confederate existence and build up the new nation.

The tide began to set back immediately after the end of the war. There were then three distinct parties, or rather shades of opinion. The old Tories still retaining their attachment for Great Britain hoped to be allowed to live on undisturbed, the past forgotten. The extreme Whigs, on the other hand, violently enraged against the Tories, wanted them driven from the state and their property confiscated. Dividing itself off from them was a group of more moderate Whigs, who, while favoring the exclusion of the Tories from all participation in the government, were opposed to banishment and confiscation. The radical Whigs were at first in a great majority. Laws of extreme harshness were passed in many states and the Tories forced to migrate under circumstances causing them

great suffering. Gradually, however, the moderates grew in strength, supported by such men as Adams and Hamilton. Here are the first beginnings of the conservative Federal party. But it was slow in forming. Many of the great leaders who would naturally foster it were abroad or attending to their private affairs. In time, however, the moderate Whigs grew more and more determined in their stand for a strong government. The financial needs of the country became so great that impost taxes were requested from the States. A strong conservative following was drawn to the support of this measure. In 1786, party lines were deepened by a wave of paper money enthusiasm which swept over the country, arousing the enthusiasm of the anti-conservatives and winning to its support a majority in seven states. In the meanwhile these anti-Federalist elements;—it is not correct to call them radicals, they were more anarchistic in their tendencies;—were driven into more and more violent opposition by the efforts of the creditor classes to enforce their legal rights in the courts, and finally broke out into open disorder and rioting. There was the inevitable reaction. Shay's Rebellion in Massachusetts, and the disgraceful conduct of the anti-Federalist malcontents in Rhode Island, greatly strengthened the conservative movement. New England had been the anti-Federalist stronghold. These outbreaks changed public opinion there in a few months. The propositions for a convention to reform and make stronger the government, already warmly advocated, were carried through. There were at this time among the conservatives a number of influential extremists who leaned strongly towards monarchy. On the opposite wing were those who abhorred a monarchy, but did not believe in the feasibility of a common representative government, and favored a sectional division into three separate confederacies where state rights would be secure. Between these two the great body of the party wanted a stronger government, of what sort they little cared, providing order was restored. From these various wants grew by a series of compromises the present Constitution. The promulgation of that document drew sharp the line all over the country between the Federalists and the anti-Federalists. Among the former were most of the merchants and importers of the great towns, the creditor classes, the educated, the great political leaders, and the old Tories who saw in a strong government their only hope of personal security. Against them were arrayed the few who opposed the Constitution on principle, swayed by local jealousies and fear for the welfare of the states, the second-rate leaders whose talents would shine more brightly in the lesser state arenas than in the larger field of national politics; the debtors,

the paper money men, the persecutors of the old loyalists, and all elements of repudiation and anarchy. The conservative wave was irresistible. The Constitution was carried through. The task of nation building lay ahead.

Here begins the most clearly distinguished division into conservatives and radicals that has existed in the history of the United States. The conservatives now favored strong central government in the hands of the wealthy and educated, and a return, as far as possible in a republic, to the principles and forms of the English Constitution. The radicals favored decentralization, a high degree of local self-government combined with a weak national government, and the rule of the masses. Since all the wealthy, the educated, the aristocratic, were Federalists, their opponents accused them bitterly of English tendencies and hankerings after a monarchy, of fostering class supremacy, aping court measures, striving for hereditary powers and distinctions and prostituting the Treasury to the money power. They did, in fact, often speak fondly of the perfection of the English constitution, though they cannot fairly be accused of disloyalty to the republic either in thought or action. They had great distrust of the stability of the government, fearing the jealousies and democratic tendencies of the state governments, and so they took every means available to strengthen the federal power. Some of them, notably Hamilton, were not averse to the annihilation of existing states and their reconstruction on new lines. They distrusted, too, the judgment of the people and dreaded a broadening of the principles of popular representation. They were, in no doubtful sense, a strongly conservative party. To the ranks of their opponents were gradually drawn the liberty loving, those who believed in state rights as a protection from central despotism, those who trusted the people and hated the aristocrats. They were fired with enthusiasm by the French struggles for liberty. Their opponents reviled them as Jacobins and Democrats, and prophesied that their advent to power would result in anarchy and destruction.

At first the radical forces were weak. They were few and faint hearted. In the first congress there was no distinguishable party line. There was a general agreement to give the new government a fair trial. But gradually the anti-Federalists increased in numbers. The government from the start adopted a vigorous conservative policy. The funding of the national debt, the assumption of state debts, and the rigorous excise laws which Hamilton forced through in quick succession, rapidly alienated the more liberal wing of his followers and within a year or two a bitter party strife was in full swing. The division was widened by the conflict over the National

Bank. Such influential men as Jefferson and Madison drew away and became the leaders of a radical opposition. Their sympathy with the French became more and more marked. Party feeling raged around the complicated foreign situation with extreme bitterness. The President's proclamation of neutrality between Great Britain and France issued in 1793 intensified the conflict; the radicals sparing not even Washington in their scathing denunciations of the government's policy. The breach between the parties became fixed.

For a while this French enthusiasm so helped the radicals as to give them a majority in Congress. But the overweening confidence with which the French minister Genet, relying on this feeling, appealed to the people in open insult of our government, combined with the downfall of Robespierre and the Jacobin clubs in France, caused an anti-French reaction to set in. The enthusiasm of the Republicans began to abate. Even the great unpopularity of the Jay treaty with Great Britain was not enough to stem the tide. The attempted interference in the election of 1796 by Adet, Genet's successor from France, in favor of the Republicans increased the conservative swing. The Federalists not only elected Adams, but secured a safe majority in Congress. Their forces were up to this time united and harmonious. Under the guiding hand of Hamilton, the party was well organized, its policy clear cut and strong. The radicals on the other hand had been undisciplined. They had no common program. They had simply combated the government, and vilified it. They had gone to the verge of fanaticism in their French sympathies. What political views they had had were aimless and unpractical, caught from the French doctrinaires. They were an unorganized but violent opposition rather than a party.

From this time on a marked change took place. The strife between Adams and Hamilton began to break up the Federalists. Nevertheless the insulting tone of France in the X Y Z negotiations and the near approach to war with that country which resulted, brought triumph to the conservative arms. In their elation the Federalists thought they had won a final victory. They pressed on into extremes. A rigorous Naturalization act and the Alien and Sedition laws were passed against the advice of their wisest leaders. In the outcry which was raised against these measures the conservative leaders committed themselves irrevocably to their defense. They grew more and more aggressive in their pronouncements for a strong government. The vigorous war measures they adopted required increased taxation. Salaries were raised, federal offices increased. Economy was thrown to the winds. Thus the conserva-

tives overreached themselves. The opportunity for the opposition was at hand. Jefferson had been long on the alert, waiting just this opening. As Vice President, and from his home at Monticello, he had been quietly organizing and disciplining a great new party. He was the first great party organizer, a consummate master. Under his influence the Republicans, as he called them, were welded together into a solid radical party. They adopted a positive policy. They gave up their French favoritism and stood in opposition to the government's anti-French demonstrations, for strict neutrality. They combated British ascendancy and all tendencies towards American centralism. They denounced vehemently the Alien and Sedition laws as infringements on the rights of personal security. In the Virginia and Kentucky resolutions they went so far in their deprecation of central despotism as to promulgate the doctrine that the State may declare void whatever Federal acts it considers illegal. They opposed the war measures, and all attempts to increase the army and navy. They criticised the Federalists severely for their multiplication of offices and utter disregard of economy. The conservatives had gone too far and left themselves open to attack. Jefferson, with a well organized radical party at his back, with a definite policy of reform for a battle cry was ready to take the chance. The election of 1800 witnessed the complete overturn of the conservatives and the installation of the radicals.

The development of the Federalist and Republican parties which has just been outlined is worthy of particular notice because it is an excellent example of the normal growth of parties under a republican form of government. The country quickly divided into two strong, well defined parties, one in power, the other in opposition; one conservative, making towards the old, one radical, striving for the new; one composed of those who wished for as near a return as possible to the forms of English Constitutional government with the educated and wealthy in control, the other composed of those who wished to go ahead and create a genuine democracy where the people should rule. The Federalists were on top until the excess of their conservatism showed the people that for progress in democracy they must turn to the radicals. Party development up to this point was so typical of the norm that it could fairly have been expected to continue along the same line. It would have seemed that the conservatives, strong and aggressive as they were, would continue to be a powerful influence to restrain the Republicans, ready to take the control from them as soon as they went a step too far. The radicals came in with a strong majority, with definite principles of reform; principles so radical and so warmly advocated that the

Federalists saw in their advent to power imminent danger of anarchy and disorder. So strong was this fear of radical innovations that they were willing to go to any length to keep in power. Their plan to win Burr over to their camp and choose him President instead of Jefferson when the election came into the House, seems to have been defeated by no sense of honor on either part, but only by the over astuteness of Burr. Thus the radical and conservative forces were in sharp conflict. The natural and logical sequence would have been a long continued struggle, now one party gaining the fore, now the other, and gradual progress the result. In a word, had no modifying forces come into play, an alternation of Radical and Conservative governments, such as we see in England, would have occurred.

For a time, this seemed likely to be the probable course of events. The main body of Federalists quickly acquiesced in the result and set to work to organize for a vigorous fight for conservative principles. Two or three newspapers were started by them with this object in view. There were no signs of permanent yielding on their part. Their flag was nailed to the mast. Strange to say it was the victorious flag that was struck. No sooner did the Republicans come into power than they began, one after another, to abandon their radical principles; most of them without a trial or even a struggle. So rapid was this surrender that in sixteen years not a trace of their old policy remained. When Monroe's administration began, in 1817, there was no longer a division between the parties. A few of the most extreme of the old Federalists had sung their death song in the Hartford Convention. The rest had been absorbed by the Republicans, as they fell back onto the conservative position. The Republican party had become completely Federalized, in fact as well as in the taunts of their old opponents.

A brief sketch of the course of the party will serve to make clear the completeness of this sudden evolution. The key-note of the policy of the anti-Federalists at the time they came into control was fear and hatred of the aristocratic bias which the party in power had been giving to the government. They were vehemently opposed to a strong central power. The main policy enunciated by Jefferson was clear cut and definite, to reduce the Union to a league of States. The Constitution as a grant of powers was to be construed with utmost strictness. In 1800, on the eve of his election, Jefferson declared that "the true theory of our constitution is surely the wisest and best; that the States are independent as to everything within themselves, and united as to everything respecting foreign nations." Such a federation for the sole and specific purpose of

controlling foreign intercourse would need no expensive or elaborate machinery. Thus "our general government may be reduced to a very simple organization and a very inexpensive one; a few plain duties to be performed by a few servants." Consistent with this conception had been at all times the action of the Republicans.

On coming into power the Republican party in accord with its past and its principles stood pledged to a definite radical program, embracing simplicity and economy in administration with a reduction in the number of offices; permanent opposition to the growth of military power in the hands of the government; the repeal of the internal taxes; the refusal to recharter the Bank; and above all, as their cardinal principles, to do absolutely nothing to strengthen the Federal government at the expense of the States, to exercise such powers only as a most strict construction of the Constitution allowed, and to take every step possible towards enforcing the doctrine of decentralization and state rights. To secure economy by a reduction of offices and to repeal the fourteen year Naturalization Act of the Federalists were in the nature of immediate reforms, rather than of permanent policy. These were at once carried through before radicalism had lost its force. The internal taxes were also repealed, an inclination to hedge being shown already in the President's intimation that it might sometime be necessary to re-enact them. After the war of 1812 the taxes were again imposed; under the stress of circumstances it is true, but in entire violation of the Republican principles of government, in accord with which Jefferson had maintained that such taxation never ought to have been allowed by the Constitution and never should have been enacted in any event. Gradually the opposition to a military establishment faded away. Jefferson reluctantly increased the navy and his successors with less reluctance. In 1800 the Republicans had scouted the idea that it was necessary to have a standing army. In 1802 they established one of 2,500 men and in 1815 increased its strength to 10,000. The lessons of war forced it on them; but they had violently opposed all military encroachments when war with France was imminent in the days of John Adams. The National Bank, which they had so persistently declared to be unconstitutional when it was first chartered and still thought to be so when they refused to recharter it in 1811, was given a new charter on an enlarged basis by a great Republican majority in 1816. But even more remarkable was their entire change of front with regard to the nature and powers of the central government and the construction of the Constitution. The men who had denied the right of the government to establish a bank did not stop to question its authority to acquire and rule over



a vast tract of land purchased from a foreign power. Congress, in governing this new territory, gave powers of supervision over it, equal to those of any monarch, to the man who had been infuriated by the pomp of Washington's levees. The party which had always maintained as its one grand fundamental principle the strict construction of the Constitution and the extreme limitation of federal power, allowed the President to exercise an authority far greater than ever attempted by the Federalists, and approved conduct of Jefferson's which even he himself believed to be unconstitutional, quietly neglecting to pass the amendments which he considered necessary to validate his action. If the President is to be allowed to transgress or even enlarge what he believes to be his constitutional limitations whenever his party deem it necessary, on the trust that subsequent amendments will make it constitutional, what is left of state rights and strict construction? But their surrender of principles did not stop here. When the offenses of Great Britain began to be unendurable the Republicans passed the famous Embargo Acts. At first, perhaps, a war measure, they continued it with the avowed purpose of protecting our commerce. The act affected seriously only New England States, where it worked great hardship. As a war measure, for a short time, it may have been within Republican principles. Continued as it was, it was a piece of federal tyranny, the central government in the exercise of a paternal authority enforcing absolute control over the commerce of the States, the majority imposing a ruinous restriction upon the liberties of a few. The party which had so bitterly resented the Alien and Sedition laws as an unwarrantable attack upon personal rights now, in not merely regulating but entirely destroying freedom of trade, infringes even more seriously upon the rights of property. The earlier measures threatened at the most the personal liberty of only a few individuals, the embargo ruined the business of whole sections. The merchants of New England resented with natural anger this attempt of the central government to decide what was best for their business and enforce its decision to their destruction. Jefferson, who had winked at the Whiskey Insurrection as not at most "anything more than riotous" and disapproved Washington's measures to suppress it, and who wrote the Kentucky resolutions, maintaining the right of the State to resist even to the utmost the tyrannous use of Federal power; now writes to his Secretary of War, when Boston merchants grew restive, to move on the first symptom of any opposition to law and put down at once any commotion. The party which had stood for the weakest sort of a Federal government and the jealous guardianship of every right of the State as the only corrective for cen-

tral despotism, passed the Force Bill, authorizing the free use of the Army and Navy in enforcing the provisions of the embargo in the recalcitrant States. Nor did the change of front stop even here. The Federal government which was to be but a league of states to deal with foreign relations was early urged by Jefferson to devote itself to the task of building all manner of internal improvements, with the avowed purpose of thereby cementing and strengthening the Union. Madison remained somewhat more true to original convictions. He changed ground entirely as to the advisability of such action and recommended it highly in the same message in which he advocated the conservative policy of an increase and more perfect organization of the army and navy and the establishment of military academies, but clung enough to the past to consider constitutional amendments a prerequisite. The main body of the party, however, no longer rode the strict construction horse and pressed forward along this line until internal improvements became a predominant Republican principle. Similarly the policy of protection of manufacturing interests which Hamilton had foreshadowed in 1791 was taken up gradually by the Republicans as a better means of creating mutual interdependence between the States and strengthening the Union. Strict construction would have faltered long before adopting protection. The full extent to which this policy was carried in the later days of the party was in direct opposition to the fundamental doctrine of radical days, which made for a rapid decrease of Federal powers.

Thus every one of its radical principles, the disestablishment of the Bank; opposition to excise laws, internal improvements, a standing army and a strong navy; strict construction; the jealous preservation of state rights; and the weakening of central authority in every possible way; was in a short time entirely abandoned. The radical party adopted the conservative principle of strong government in all its details.

This phenomenon of course may be attributed to numerous causes. The exigencies of the situation, especially during war times, a closer and clearer knowledge of the practical working needs of a government, the responsibility of power, all tended to hold the radicals within bounds and show them the folly of many of their theories. Every radical party tends to become less extreme with the advent of power. Many plans are given up as infeasible. Events show the folly of many a cherished purpose. These same forces are at work in every country, tending to make the action of both radicals and conservatives vary widely from their promises. But nowhere else have we seen a complete and absolute change of policy,

not only in details but in its most fundamental points. Where else has a radical party, under most pressing circumstances, absolutely surrendered its dearest principles and become conservative? Nor was such an entire change of front necessary under the circumstances. Had the Republicans thoroughly believed and trusted in their announced policy they would not so easily have given it up. Granted that their original program proved unwise in the course of events; nevertheless, had their principles been ingrained, they would have modified their policy only in details and remained true to its fundamental positions. Elsewhere, when radical plans of reform work badly the reaction comes among the people, turning their support to the conservative party; it does not entirely transform the radical party itself. There is an underlying cause which must not be left out of consideration if we would adequately account for the completeness of this evolution. The real and basic purpose of Jefferson and his followers was not to carry out their theory of as little central government as possible. They really cared for state rights and strict construction so little that they were ready to sacrifice them at the first emergency. The Republicans, and Jefferson in particular, were great doctrinaires. They talked eloquently, theorized earnestly; yet in practice cared not a whit for their dogmas and principles. One desire inspired them all. It was the desire to rule, the yearning to have the power in their own hands. They had seen the government drifting into the control of what they looked upon as the aristocratic, the monarchical, British faction. And so they fought with savage energy to lessen the power their foes were winning. When, in time, Jefferson realized that the people if united could win for themselves this power, he began to organize them into a strong, coherent party. His aim, their aim, was simply to wrest power from the "Monocrats," to give it to the people. Whatever the shibboleths they shouted, whatever the cardinal principles of their confessed faith, this was the one common, all inspiring motive, to come into power, to let the people govern. That was the real radicalism of the Republican party. That goal won, there was left only to keep what had been gained. No change was wanted now; their wish, only to conserve the government which had come into their hands. When we see that not their principles, as is common in parties elsewhere, but the desire to rule was their prime motive, the startling changes of front, the sudden evolution from radicalism to conservatism, becomes clear and consistent. It was when the classes controlled the Federal government that the people wanted the central authority weakened. When they secured that control for themselves and felt sure of their ability to keep it, they

began to use and increase rather than diminish it. The power which, in the hands of their foes, they strove to weaken, in their own hands, they sought to strengthen. Instead of doing away one by one with the powerful institutions built up by the conservatives as they had promised to do, they adopted and reinforced them. Their real purpose was to govern, not to govern in a different way. The power once won for the people, the safest and surest way to use it was along the old, well-tried, conservative lines. Innovations and changes would have divided their ranks and risked their control over the government. So perforce they grew conservative.

The development of the Republican party which has just been traced is valuable for the light it throws on the course of future parties. No party has ever been so thoroughly radical, none has ever so completely changed front. In none can we trace so easily the underlying cause which wrought the change. Yet in the more partial and confused transmutations of later parties we can now readily discern the same force, the same love of power and office, which, triumphing over love of principle, has changed them from radical to conservative.

During the administration of Monroe, the "era of good feeling," there was but one party. That was the Republican, once radical, now become conservative. During this and the next administration its conservatism became more and more pronounced. The evolution culminated in the administration of Adams. The strong national feeling manifested itself in a renewed impulse towards internal improvements and the growth of a sentiment in favor of a high protective tariff which finally grew into Clay's American system. The government moreover had again fallen into the hands of a limited class of office holders. From Congress to Cabinet, to Presidency, was the regular progression. The executive was nominated by a Congressional caucus and was largely controlled by Congress. A conservative body of political leaders were in full control of the country. But a radical reaction had set in. As far back as 1818, when the movement for internal improvements was gathering great headway, a strong current of opinion began to make back towards a strict construction of national powers. At about the same time financial panics, due largely to reckless management, caused the banks of Tennessee and Kentucky and most of those in Ohio to suspend specie payment. They believed, more or less honestly, that their distress was due to the influence of the Bank of the United States, and publicly attributed it to that cause. This aroused intense hostility to that institution in those states; a feeling which was reciprocated with more or less intensity among all those interested in

other state banks. Many of the States tried to weaken the Bank's power in every possible way. Maryland would have taxed its Baltimore branch out of existence had not the Supreme Court come to its rescue by deciding, in the case of *McCulloch v. Maryland*, in favor of the constitutionality of the Bank and against the right of a State to tax this branch of the national sovereignty. This feeling against the National Bank grew more and more widespread in the next ten years, fed on stories of dishonesty in its management, stock-jobbing, and of other evils incited to stir up that popular antipathy to strong financial institutions and the "money power" which is always latent in the masses. Another strong factor in this new radical movement was the attitude the South began to take towards the government. Although the Missouri Compromise had disposed of the slavery question for the time being, the Southerners had been shown on which side their interests lay. A strong government meant a continual menace to slavery. In the House they would always be in a minority, in the Senate they could only by perpetual endeavor keep the balance of forces. Thus anti-slavery forces would prevail in Congress and it behooved them to weaken its power over the States and individual rights as much as possible. So the South began to lean strongly towards strict construction, state rights and weak government. The next session after the Missouri Compromise they introduced bills into the Senate to limit and decrease the Admiralty jurisdiction of the Federal Courts, to make the Senate the final court of appeals in all cases where a state is a party, and to limit the total number of Representatives to 200;—measures clearly intended to weaken the Federal government. It may be noted in passing, that this feeling of the South was emphasized some years later by the conflict of Georgia with Federal authority in the Cherokee Indian matter. Of equal importance as a factor in the growth of radical sentiment was the development of the West. The opening up of a great extent of new territory caused a general expansion of population. In the new country was room for all. The natural result was the development among the settlers of a strong sense of equality and self-reliance. Men grew strong, independent, and confident of their own powers. Democratic ideas had space to take firm root. The self-reliant Westerners began to chafe under the rule of the conservative aristocratic classes of the East. There was a scarcity of money among them which increased their jealousy of the Eastern money power. So they were ready to unite with the radical, adventurous elements of the older states in an attack on the rule of the capitalists and the Bank. This tendency was to some degree held in check by the desire for a sys-

tem of national roads, which would aid materially in the industrial development of the new country and by the fact that there was little care for state rights there. The new states owed their existence to the national government, they had no independent history in which jealousy of the Union could take root and flourish. A strong national sentiment was one of the most beneficial results of the opening up of the West. Nevertheless the radical forces were strong and the time was growing ripe for conservative excesses to drive the Westerners to unite with the South and the Eastern malcontents in open outbreak. The anti-conservative feeling everywhere was gradually being intensified by the series of decisions handed down from the Supreme Court under the lead of Marshall and Story. One by one these opinions were given out in favor of a liberal construction of the Constitution and a strong national government. They were of inestimable service in securing to the Federal Union the strength and coherence of a great nation. They served also to arouse fear and jealousy of the Federal power.

Thus the train was laid for a general radical explosion. The movement which has been sketched was among the masses of the people. It affected little, if at all, the leaders in Congress. The radical party did not spring into power until more or less fortuitous circumstances forced a body of politicians into an anti-conservative opposition. When a group of leaders suddenly found themselves radical, they found a radical party all ready to be organized and led to victory.

During the close of Monroe's administration there were no parties in Congress. Political conflict waged around the efforts of individual leaders to ascend to the presidency. The campaign of 1824 was one not at all of measures, but entirely of men. The popular choice was Jackson and he received a plurality of electoral votes. In the House, where the undecided election was settled, Adams was the logical candidate and with Clay's help was elected. The only conspicuous feature of the election from a political standpoint was the overthrow of Crawford, the Congressional candidate, and the caucus system, of which he was the regular nominee. Jackson was at first inclined to acquiesce pleasantly enough in the result until stories of a corrupt bargain between Adams and Clay made him believe that he had been cheated out of the presidency. His indomitable ire was at once roused and he and his managers set to work for the next campaign. They adopted the one comprehensive principle of opposition. Whatever point of attack Adams left open they struck for. Clay's Panama Mission, for example, roused a totally unwarranted storm. The trend of the administration was

conservative and towards high centralization. Consequently the Jacksonians gradually became radical. In the campaign, however, they announced no definite policy. On the tariff Jackson faced one way for one section, another for another. Their one war cry was that the people had been defrauded of their choice, that a wicked aristocracy of officeholders had by corrupt bargaining cheated the people's hero out of his due and thwarted the popular will. They wailed that the majority no longer ruled; that there was an oligarchy of officeholders who forced their own way down the nation's throat; that the party in power was corrupt, extravagant, aristocratic, bent on crushing out the liberty of the people. The great radical forces which had been silently arming for ten years rose at once on the sounding of this battle cry. Jackson's managers, well schooled in New York politics, organized the party with extreme skill, holding out the bait of a division of the spoils to draw their forces together. The radical wave swept Jackson into office by an overwhelming majority. The people felt that they ruled once more.

The radicalism of the Jacksonian like that of the Jeffersonian uprising was in its underlying motives a grasping for power. With Jackson, his managers, and the politicians, it was not even nominally a contest for principles. They came into power with their political creed entirely to be made. In control they took little initiative, simply awaiting Clay's policy that they might oppose it. With the politicians from top to bottom it was purely and simply a grab for office. With the people radicalism was more clear cut and genuine, yet even here it was not for radical policies they strove. They were, it is true, as a rule opposed to the "money power's" National Bank. The Southern element was for the most part out and out radical on principle. They wanted a weaker government. Yet the movement in its whole breadth and depth was radical in seeking not a change in policy but a shifting of power. How the government was conducted they cared little, well content with present policies. Their complaint was that it had fallen into the hands of what they chose to consider an aristocratic, capitalistic monopoly of office holders. They rose in their might to win it back to themselves. In this only they were radical; this accomplished the government could go on in the same old lines, or as their chosen leaders should see fit to guide it.

In this conception of the real radicalism of the Jacksonian party we are able to understand how their policy could be such a varying hodge podge of radical and conservative measures. Had the radicalism been that of principle and policy it would have remained

clear cut and persistent, for the Whig conservative opposition was strong and aggressive. As it was, the real radical object was accomplished in victory; the various elements among the politicians were left to fight it out, until the force of organization gradually made the party over into complete conservatism.

Jackson was at first inclined to take radical grounds. He chuckled gleefully over the way the Georgia state government defied the power of the Supreme Court; in this case apparently favoring weak central control over the states. He at once began his bitter attack on the Bank, led on largely, it would seem, by motives of purely personal animosity. He vetoed a number of bills for internal improvements. He leaned gradually towards a reduction of the tariff. This was as far as he went in radical measures. When South Carolina freetraders passed the nullifying resolutions, encouraged, no doubt, to a great extent by Jackson's stand for state rights in the Georgia and Alabama Indian troubles, they were astounded by a sudden change of front by the President. He came out flat footed for the strong conservative principle expressed in his famous toast, "The Union; it must be preserved." In ringing messages he denounced the nullification doctrine and, though compromising on the tariff, pushed through Congress a Force Bill calculated to maintain the authority of the government by arms if necessary. When radicalism threatened the power in his own hands he at once became conservative. Although nominally opposed to internal improvements, his party favored them and attached provisions for them to so many appropriation bills that Jackson signed away, it is said, four times more money for internal improvements than his predecessor Adams, the recognized champion of that cause. This soon ceased to be an issue of any importance; it was shortly abandoned by all parties, largely because the growth of railroads made public roads of little value. The tariff was no longer a question upon which radicalism or conservatism took sides. It became, what it has ever since remained, a question in which sectionalism and conflicting business interests are the controlling factors and on which parties have taken their stand according to the relative strength of sectional and business interests in their ranks. In only one question did Jackson and his followers stick to a radical policy. In the overthrow of the Bank of the United States and the Independent Treasury scheme, they persisted and won out for many years. At present, however, opposition to the system of National Banks introduced by the Republicans during the war, is no part of their program. The party is too anxious for control to cling to an unpopular radical issue on a fundamental ques-



tion of national powers. In all other respects the Democrats were much sooner given over to the conservative influences. Under Polk the last vestiges of radicalism, the Loco-focoism of Van Buren, ceased to be of account. Without the slavery question, organization was triumphing over the remaining vestiges of principle, and the party could lay no claim to being radical. The slavery interest converted the party from timid to aggressive conservatism.

The underlying motive of the Southern element had always been conservative, to preserve the interest of slavery. An aristocratic, military, slave holding caste had sprung up in and controlled the South. At first their fears for slavery led them to adopt the radical policy in national affairs, of a weak government. In the repeal of the Missouri Compromise in 1854 they still maintained radical principles and kept with them the Douglass wing which favored "squatter sovereignty." In a more essential point the South grew strongly conservative. In passing and enforcing the Fugitive Slave law it upheld the right of the national government to invade the states. It sought to turn the force of the Union to the protection of slavery. On the other hand it denied the government's power to prevent the extension of slavery in the territories. In annexing Texas it stood for the conservative principle of a Federal government capable of annexing new territory and of fighting for its possession. Thus the Southerners shifted from radical to conservative principles as the exigencies demanded. There was no genuine radicalism of conviction in their policy. So far as either term may be correctly applied, the slavery interests were conservative, favoring anything that would protect the existing institutions of slavery from the fierce, radical, anti-slavery movement springing up in the North. It must be remembered that the doctrine of secession is in no sense a radical doctrine. It is not a measure of progress. It had been used by both parties. The Federalists, while out of power were constantly talking of it. Secession is not a change of policy in, it is a breaking off from the government. It was a weapon of last resort for the out party, despondent of power, be it radical or conservative.

With secession and war the Democratic party experienced a slight radical revival. The organization was now in control of the Douglass wing, the wing which had clung to states rights and "squatter sovereignty;"—the extreme conservative faction having broken off. This tendency was most strongly marked after the war in contrast with the Republican high handed reconstruction policy. That issue settled, the Democrats became merely an opposition. At the time of Grant's second election John Sherman said that there

was not the slightest difference in platform between the two parties. Since then, though perhaps containing more elements which would join a new and radical party than the Republican, the organization as a whole has been as conservative as the other.

The Whig party which sprang up in opposition to Jackson, is unique among the organizations of the century in being the only one which originated as conservative. True, it chose a radical name, and claimed to stand for liberal principles; liberty and resistance to executive prerogative. In the latter purpose it was truly a Whig but not a progressive party. It contained, too, some radical elements for one reason or another out of harmony with the Jacksonians, such as the nullifiers. It was a heterogeneous body, united only in opposition. In the main, though, it was composed of strongly conservative factions. The bulk of its support was drawn from the old National Republicans, under which name Clay had first organized the opposition. The new name and organization were adopted for the sake of attaching such elements as the Anti-Masons and the revolters from the high handed attack on the Bank. Its platform favored protection and internal improvements, and was against the Independent Treasury;—as far as the leaders dared go at this time in favor of a Bank. Its policy was that of a vigorous conservative opposition. For some years it can fairly be said the government saw an alternation of a conservative and partially radical party. The Whigs were strong among the young men, who were attracted by its high moral tone and its opposition to the Spoils System. But the old issues were fading out. Radicalism was growing weak and hesitating. Then a new question came to the fore. On the slavery issue the old radicals took an aggressive conservative stand. The Whigs were pusillanimously conservative, seeking to keep slavery down, to make compromises, to hold the slavery and anti-slavery wings of the party together. It was not clear and uncompromising enough in its defense of slavery to become the party of the Southerners. It did not dare espouse the cause of the anti-slavery men, nor even take a strong stand against further aggression on the part of the slave holders and become the radical party of the North. The country was soon to divide on this issue. The Whig party could not take sides, so it fell to pieces.

The Republican party, which was formed at this juncture, is of a type peculiar to this country—a “one idea party,” as it has been called. Such a party takes radical ground on a single issue, makes that its war cry, and is conservative or non-committal on other points. The first of this sort was the Anti-Masonic, formed in 1826, rising to some national influence in 1832, and quickly losing influ-

ence; its one purpose being the abolition of Free Masonry. Other such parties were the Liberty or Abolition party, taking extreme abolitionist ground; the Know Nothings, or American party, a secret organization whose main purpose was to weaken the influence of foreigners on the government; and, after the war, the Greenbackers and Prohibitionists. All of these have failed to gain any permanent influence, and, except the last, have shortly broken up or been absorbed in some new party. In the Republican alone can we trace anything like a complete history and note the gradual spread of conservatism.

The Republican party formed early in 1854, quickly spread through first the central and then the eastern states, absorbing and uniting the Free Soilers, all the anti-slavery elements among the Know Nothings, Whigs and Democrats. Its policy was radical, clear cut and simple. To resist the further extension of slavery in the territory of the United States, to make no more compromises, was the battle cry. The Abolitionists who favored the entire doing away with slavery could join in this opposition to the encroachments of the Democrats. Less extreme anti-slavery elements from all the other parties could bury their old jealousies under the new flag and the historic name. The new radicalism had been long preparing. There had always been a strong anti-slavery feeling. Its followers were at first derided as extremists. Gradually the movement had gathered strength. The intellectual radicalism of Emerson, New England transcendentalism, shaking off old bonds that trammelled thought and maintaining the worth and dignity of the individual man, ripened the field for abolitionist seed. The agitators, the Garrisons and others, extremists and secessionists though they were, greatly stirred popular feeling. The slave-holders in trying to defend themselves grew too aggressive. Slavery might have been left alone, confined within its original limits. When it began to force its way into the territories, when it turned the power of the National government into a tool for enforcing its unjust and abominable treatment of fugitive slaves in the very heart of anti-slavery states, when it in a word made slavery a national affair, the North could bear it no longer. The Liberty party in 1840 had polled less than 8,000 votes. It was too radical for the times. In 1844 it was stronger; sufficiently so to defeat Clay, by drawing from his support enough votes to turn the scale in New York. This Liberty party was not root and branch abolitionist. Extremists of that type leaned rather towards secession, and cared little for voting. In 1848 the Free Soilers gradually absorbing the Liberty party and led by Van Buren and Adams showed considerable strength; this

time drawing from Democratic forces, and helping to defeat Cass. Time was not yet ripe, however; the compromises of 1850 seemed to lay the slavery issue on the shelf, and in the election of 1852 the Free Soilers cut but little figure. But in 1854 the compromises were repealed, the Kansas outrages incensed public opinion, the conservatives went too far, the radical embers were fanned into a flame throughout the country; and the new party, in 1856, though not yet victorious, showed wonderful strength. In opposing the further extension of slavery it was closely united, though most of the Republicans as yet by no means held abolitionist views. The Democrats on the other hand were splitting up. The section under Douglass, favoring the old diluted radical principles of "squatter sovereignty" could not swallow the Lecompton Constitution and other slavery aggressions. On the other hand Buchanan weakly turned over the majority faction of the party into the control of southern extremists. This division made the Republican triumph in 1860 assured. After the war was well under way Republican sentiment became more and more radical, abolition became a strongly favored principle and then a fact.

Thus far the Republicans on the one question of slavery had been persistently radical. On questions of river and harbor improvements they were from the start conservative, favoring a strong government. In reconstruction they were so highly conservative in maintaining the power of the Federal Union as to arouse a temporary, radical, state rights opposition. But these issues in time were settled. The radicalism of the Republicans had been purely destructive, aiming at the overthrow of slavery. This aim was accomplished. The one principle had triumphed. The radical force was exhausted in success. Instead of making new plans for the future, the "Grand Old Party" turned to its past. It had become well organized. Its members set themselves to work to keep in power. Principle no longer ruled; desire for office became the governing passion of the party. The Republicans at once became full fledged conservatives.

There is this distinction in the evolution of the two Democratic parties and the Republican. The two former advocated a complete radical program of principles. Their real radicalism, however, was in seeking to wrest power from a small circle of leaders and restore it to the people. The principles were but the cloak of the movement. The Republicans, on the other hand, were a party of principle. They stood for a genuine radical idea. When they came into control they did not abandon their program, they carried it through. This done the party succumbed to the organization, its goal no longer progress but power.

The study of American parties has shown that the desire for power is a conservative force. The American people are more eager for office and the spoils of office than to try new experiments. In their early days principles guide the party; but when the lust for power o'ertops devotion to principle, party energy is devoted to perfecting the organization and securing offices and turns away from the search for some new line of progress. No party that has reached this stage seems to be able to originate any new measure. As an organization it fears the untried. Progress must create new parties for itself. The Populistic ideas of recent years have had to build up a new organization. Neither of the old conservative parties dared initiate such policies. The silver movement of the last election well illustrates this. At first glance, one would say that the Democratic party, or its controlling section, had adopted a radical position on the currency question. It is more true to say that Free Silver adopted the Democrats. The free silver feeling was not originated and fostered by that party. Democratic leaders have not sought out free silver as a method of progress. The feeling grew up independent of party. When it gained national strength it united with other radical factors in forming the Populist party. It increased in strength till it succeeded in capturing the Democratic party machinery. For a time Free Silver has made an entirely new party, uniting the Democratic and Populist forces. Popocratic it was suggestively called. What the future relations of the two wings of the Democratic party and the Populists will be, is of course impossible to tell. We are apparently in the midst of the growth of a new party. The radical elements of both old parties are coming together on a new Populistic basis. The Populists are to-day the true radicals. They stand for a new policy and new principles. For the purposes of our discussion it is enough to say of current events that they show the way a new principle may gather to itself a new party or revitalize part of an old one, just as the anti-slavery movement caught and made over the body of the Whig party.

Undoubtedly the underlying cause of this common evolution to conservatism is the lack of a task for radicalism to perform in this country. In the only case up till the last few years where any thoroughgoing reform was imperatively needed, the love of power and its conservative consequences did not take effect till that issue was settled on a radical basis. With the other parties progressive principles were neither deeply rooted nor persistent. Lust for power prevailed from the start, and radicalism was soon abandoned. In European countries there has been a long path for the parties of reform to traverse. Radicalism has therefore had to be persistent.

Principles have been everything, parties little or nothing. What European radicals have been fighting for, was ours from the start. Now, however, conditions are changing. European radicalism has been chiefly destructive. It has aimed at breaking down restrictions and privileges. It is gradually becoming constructive. The extreme radicals are becoming socialistic. They aim not at breaking down, but at building up a new and complex system. Americans have not been originators in political thinking. They have taken their doctrines from abroad. They had already carried into effect what has been practical in European radicalism and have been waiting for Europe to catch up. Now that foreign political thinking is moving beyond our present position, the restless among our minds are following after. Radicalism abroad is laying out a new path. That path lies open to us and radical thinkers here are surveying it. Europe is giving us new ideas, is suggesting a new policy of gradual development. In overcoming the forces of inequality with a strong paternal hand, in substituting government monopoly for a monopoly government, radicalism has before it a long and difficult task. An extensive vision of possible progress has dawned on many minds. The radical elements in the masses are growing devoted to a new and far reaching policy. Principle is gaining more attractiveness than office. Formerly they thought "If only the people rule, all will be well." Now they are beginning to think "Present evils will be overthrown if only the people rule in a certain way." A radical party struggling with the question, not who shall govern, but how shall we be governed, is springing up. This radicalism is of the type that persists. Such a party will not become conservative, for principal is its aim, not power. If, as of course cannot be accurately foretold, socialistic and paternalistic ideas continue gaining in favor as rapidly as they have in the past, we may expect to have in time well distinguished radical and conservative parties, one for the regulation of forces of economic and social inequality by the strong hand of government, the other guarding the rights of individuals and the free play of natural forces. But if these or other new notions prove to be too weak to push into the background the desire for office, the party organization will again become master, as in the days past, and both parties will be timidly conservative.

NATHAN A. SMYTH.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 85 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,

LESLIE E. HUBBARD,

ROBERT H. GOULD,

ARCHIBALD W. POWELL,

GEORGE ZAHM.

## Associate Editors:

WILLIAM H. JACKSON,

ROBERT L. MUNGER,

CORNELIUS P. KITCHEL,

HENRY H. TOWNSHEND,

GEORGE A. MARVIN,

THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

We are in receipt of the text of the opinion handed down on May 31, 1899, by the Supreme Court of the Hawaiian Islands in reference to the applicability of provisions of the United States Constitution to the newly acquired country. The cases are those of *Peacock & Co. v. Republic of Hawaii*, and *Lovejoy & Co. v. Republic of Hawaii*.

These were actions for the recovery of money paid under protest by the plaintiffs as custom duties at Honolulu since the annexation of Hawaii to the United States. The substantial question raised was whether the Hawaiian government could continue after the annexation of the islands to the United States to collect duties at the rates prescribed by the Hawaiian laws in force immediately before annexation. The joint resolution which provided for the annexation vested this power in the Hawaiian government. The contention of the plaintiffs was that immediately upon the cession of the islands the same became so far a part of the United States as to be subject to the provisions of the Constitution, and that, therefore, the legislation imposing the levy of customs duties as then existing under the Hawaiian laws was unconstitutional and void, being opposed to Article I, Sec. 8, "All duties and excises shall be uniform throughout the United States," and Article I, Sec. 9, "Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." The court refused to sustain this contention, holding that under the then existing circumstances, the provisions of the United States Constitution were inapplicable to the Islands.

The line of argument adopted by the court was summed up by the same court in a subsequent opinion (*Republic of Hawaii v. G. L. Edwards*), as follows: "Assuming that various provisions of the Constitution of the United States, in regard to which there is great difference of opinion, extend for the

purposes of ordinary or permanent Congressional legislation to territory belonging to the United States, as well as to the States proper, they do not necessarily extend of their own force to newly acquired territory immediately upon its acquisition, but that the laws and government of its ceded territory continue for such reasonable time as may, in the judgment of the political department of the government, be deemed requisite for the enactment of suitable legislation for the new territory in conformity with the provisions of the Constitution."

In arriving at this conclusion the court draws a distinction between territory belonging to the United States after Congress has enacted such legislation as amounts in effect to a declaration by that branch of the government that the territory is to be henceforth regarded as fully incorporated into the American Empire and territory, in regard to which no such representation has been made, and which may be regarded, at least for certain purposes, as in a transition state or only inchoately annexed, holding that the application of the Constitution, an instrument framed by reasonable men and with reference to recognized principles, depends upon the circumstances of the case. "The Constitution contemplates the acquisition of territory by cession or by conquest, and whether one of these methods or the other is pursued, the recognized and appropriate rules may be followed. It is a recognized principle of municipal and international law that, after the analogy of a deed, a change of sovereignty does not ordinarily take effect until delivery."

The court then discusses the question of acquisition by conquest, arriving at the conclusion that the Constitution would not extend to the conquered territory *ex proprio vigore*. The opinion proceeds: "If the Constitution would not extend forthwith to newly acquired territory in case of conquest and treaty of peace, is there any reason why it should in case of an acquisition by cession alone? \* \* \* If the Constitution is not in force in the newly acquired territory at once, it is not because of necessity—a necessity with reference to which and to the recognized principles growing out of it, the Constitution must be presumed to have been framed. Can it be said that there is not the same necessity in the case of cession as in the case of conquest, because in the former case time may be taken to provide for a change of laws and government before the cession is made? Could it not be said with equal force that such time might be taken before the ratification of a treaty of peace in case of conquest?"

The plaintiffs, however, contended that Congress has already acted in this case—reference being had to the clause in the joint resolution concerning the customs laws. To this the court replies:

"Now, in the first place, the mere fact that Congress has taken some action in regard to newly acquired territory, is not sufficient to indicate that in its opinion such territory has become or ought to be considered fully incorporated into the American Empire. If annexation is accomplished by joint resolution, that of itself is action by Congress with reference to the territory acquired. That is not sufficient. There must be legislation to such extent, or of such character as to indicate that in the opinion of Congress the territory has become essentially a part of the United States. The legislation must be something more than of a mere temporary or provisional character. If the clause of the joint resolution referred to indicates anything, it indicates, especially when taken in connection with the other clauses, that Congress was of the opinion that it was not then in a position to make permanent provision for these islands, and that it needed further light and further time to enable it



to do so. The legislation continuing the Hawaiian customs relations cannot be held unconstitutional and void, as positive independent legislation in controversion of the clause of the Constitution in question. The joint resolution must be treated as a whole. It is an attempt to annex these islands to a certain extent or for certain purposes for the time being, full annexation to be contemplated at a later period."

A general summary of the opinion may be stated as follows: That the Constitution of the United States was framed by reasonable men to provide for the requirements of a sovereign nation and must be construed with reference to recognized principles; that construed with reference to those principles, all its provisions that may be ultimately applicable to acquired territory do not necessarily extend to it of their own force immediately upon conquest, or the ratification of a treaty or the passage of a joint resolution of annexation; that this is well settled in certain cases, as, for instance, in case of cession until transfer of possession, and in case of conquest until treaty of peace; that there is much reason to believe that it may be so even after transfer of possession or treaty of peace until such action is taken by Congress as indicates that incorporation of the new territory into the United States is regarded as completed; that there is no distinction in this respect founded in reason between a cession in a treaty of peace and a cession by treaty in time of peace, or between a cession by treaty and a cession in pursuance of a joint resolution, and that the power to acquire by treaty or joint resolution as well as the power to acquire by conquest carries with it all necessary and proper incidental powers, one of which may be the temporary continuation of the laws of the acquired territory, though inconsistent with certain specific provisions of the Constitution, the duration of which temporary status is within the discretion of Congress.

The case of *Hawaii v. G. L. Edwards*, referred to in the Peacock case, was one of a criminal nature. The defendant having been convicted of a crime, sued out a writ of error based on the ground that the trial and conviction were illegal because the indictment had been found a true bill by the circuit judge, as required by the Hawaiian statutes, and not by a grand jury as supposed to be required by the Fifth Amendment of the Constitution of the United States, and because the verdict was rendered by ten only of the twelve petit jurors as permitted by Hawaiian statutes, and was not unanimous as supposed to be required by the Sixth Amendment of the said Constitution. In the decision of this case the court adopted substantially the same line of reasoning as in the Peacock case. Though both of these cases involved the construction of the joint resolution of annexation, in the Peacock case, which involved the constitutional provision with reference to uniformity of customs duties, it was expressly declared in the joint resolution that the customs relations of these islands with the United States and other countries should continue until the United States customs laws should be extended to these Islands, while in the present case there is no clear declaration one way or the other. One clause in the joint resolution provides: "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution, *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United

States, shall remain in force until the Congress of the United States shall otherwise determine." The defendants argued that on the principle of *expressio unius exclusio alterius*, the expression of an intention to continue in force those Hawaiian laws which were not inconsistent with the Constitution of the United States implies an intention to discontinue those laws which were inconsistent with the Constitution. The opinion of the court, in which they refuse to sustain this contention, may be summarized as follows:

That the argument is founded on inference, and being so founded, it must take into consideration not only the inference from the particular clause referred to, but all the inferences that may be deduced from the joint resolution as a whole and from the circumstances under which it was adopted; that the inference is not a necessary one, it being subject of modification or rebuttal by other inferences; that the continuation of certain Hawaiian laws does not of necessity repeal the remainder; that, as decided in the Peacock case, the municipal legislation of Hawaii would continue in force temporarily in the absence of any declaration on the subject one way or the other, therefore to make the inference in question would be to hold that the sentence of the joint resolution under consideration was intended to be, not, as it purports, an affirmative declaration of what should continue, but an indirect repeal of what was not declared to continue, and that on general principles such a construction should not be favored; that this general principle finds support in the course pursued in reference to other repeals in the joint resolution, the same directly repealing certain portions of the Hawaiian law (Chinese immigration, and in the paragraph in question, Hawaiian treaties); that this view finds further support in the general intentions of Congress as shown by the resolution as a whole, inasmuch as Congress did not attempt to go into particulars except with reference to a very few matters with regard to which there was special reason for making particular provision; that it is improbable, in view of this general intention manifested in the joint resolution as a whole; that Congress intended by the incidental indirect clause in question to repeal large and most important portions of Hawaiian laws blindly, without any knowledge of the result and without substituting other necessary provisions in their places; that it is obvious from the decision in the Peacock case that there is at least much reason to believe that Congress did not intend to extend the Constitution in all its fullness to these islands immediately, and that the construction contended for should not be put upon the clause in question if that can be avoided; that this construction can be avoided in that the clause in question is a declaratory as distinguished from a remedial provision—declaring what the rule would be in the absence of any provision on the subject, and that inasmuch as this provision (continuing Hawaiian laws) was inserted it was necessary for the sake of truth and exactness to name the exceptions.

## RECENT CASES.

**AGENCY, UNDISCLOSED — SALES — CONDITIONS AGAINST RE-ENGAGING IN BUSINESS—HAMBLIN v. BIRCH**, 59 N. Y. Supp. 40.—Plaintiff bought out a restaurant with the understanding that the vendor would not thereafter, directly or indirectly, engage or be interested in restaurant business in that city. The business belonged to defendant's wife, Louisa L. Birch, but was conducted for her by the defendant, he signing her name, L. L. Birch, without any qualification or addition. He signed and indorsed checks in her name, and bill of sale of the business to plaintiff was so signed by him. It contains this provision, "and I further agree that I will not be connected in any way or have capital invested in any restaurant or lunch room in the city of Yonkers according to verbal agreement." *Held*, the fact that he fails to disclose his agency does not render the condition applicable to him individually.

The courts lay down the broad rule that where an agent in his dealings with third parties does not disclose his principal, he is personally liable on the contracts. This rule is supported by all authorities. 1 Amer. and Eng. Encycl. of Law, 2d ed., 1122. But in the above case the rule of law does not go to the extent to involve a separate and distinct penalty to be borne by the agent personally in addition to the one which could be enacted against the principal whenever her identity is disclosed. He can be made to pay any damages sustained by plaintiff from any breach of warranty contained in the contract, including damages resulting from carrying on the prohibited business by the principal. But the agent, because of his failure to disclose his agency, since no fraud was perpetrated by him, cannot be enjoined from entering a business prohibited only to the vendor, because if that were the case the vendee would have acquired the right to enjoin two individuals from competing with him where he intended and expected to acquire the right of enjoining one.

**ASSESSMENT FOR PUBLIC IMPROVEMENTS—FORCED CONTRIBUTIONS—CITY OF SHREVEPORT v. PRESCOTT ET AL.**, 26 So. Rep. 664 (La.).—A local assessment to pay the cost of street improvements levied under compulsion of law alone, i. e., without the knowledge or consent of the abutting proprietors, is a tax, because such assessment is predicated upon fiat of the Legislature and not upon petitions signed by abutting property owners.

The court in this case has evidently not used "tax" in the way the term is ordinarily understood. For in its ordinary meaning a tax is not an assessment, as recognized in the cases of *In re Opening of Streets*, 20 La. An. 499, and *Munson v. Atchafalaya Basin Levee District*, 43 La. An. 15. An assessment is undoubtedly a species of tax, being levied under a taxing power, and it would seem to be in this sense that the court uses it. But granted this, the reasoning is peculiar. The fact that the abutting property owners have had no say in its levy makes it a tax. We have never seen this urged before as a means of distinguishing a tax from an assessment. In the case of *Indianapolis v. Imberry*, 17 Ind. 175, they consider a levy an assessment when made for the purpose of local improvement and not petitioned for by the abutting property owners. The same view is held in the case of *Baker v. Tobins et al.*, 40 Ind. 310. In both cases the city charter allows the Common Council to make such assessment upon a two-thirds vote. We understand a better distinction to be

this; a tax is laid upon a person, there must be some person to tax, and a default is necessary before the property can be levied on, while an assessment is laid on the property and it must pay it. Here is a distinction, but the reasons the Louisiana courts give are as applicable to an assessment as to a tax, and consequently as far as we can see establish no distinction.

**COSTS IN ADMIRALTY—EXPENSE OF PROCURING RELEASE BONDS—THE SOUTH PORTLAND, 95 Fed. Rep. 295.**—The expenses incurred in procuring from a surety company the execution of a bond for the release of a libeled vessel is a legitimate item of costs to be taxed in his favor. It has not been customary heretofore to allow anything to owners of vessels who successfully defend suits in rem against their property as compensation for expenses incident to furnishing the security required of them by law and the rules of practice. Such owners consequently were either deprived of the use of their property or prevailed upon wealthy persons to aid them by becoming sureties. With the growth of surety companies an easy and legitimate means of procuring such security as is required is offered. The awarding of costs in admiralty proceedings being a matter of discretion with the court (1 Enc. Pl. & Prac. 290), it would seem to be a decidedly business-like and common sense view that the court has taken in ruling as it has done in this case. A surety company is now allowed on the bond of any executor and can have the expenses taken out of the estate.

**CRIMINAL PROCEDURE—DUPLICITY—JOINDER OF OFFENSES.—STATE V. HEWES, 57 Pac. Rep. 959.** The defendant was charged with the murder of Robert Bornar "by hitting him with a club, and by shooting him with a certain pistol," etc. The defendant appealed from a district court to the Supreme Court of Kansas, complaining, among other things, that the charge was bad for duplicity and uncertainty because it did not particularly state whether Bornar's death resulted from clubbing or shooting. *Held*, where an offense charged may be committed by two different means, since several acts connected with and forming part of a general offense may be stated in a single count, its commission by both means may be charged in one count of the information, and proof of any one will sustain the allegation."

To uphold this decision, which is at variance with the general rules of the joinder of offenses, the court relies on *State v. O'Neil*, 51 Kan. 651, 33 Pac. 287, in which it was held that where a murder may have been committed by different means, and it is doubtful which was employed, its commission by all may be charged in one count of the information, and proof of any one will sustain the allegation, but the means so charged in the same count of the information must not be repugnant. It would clearly seem that, according to the general law of criminal procedure, the charge against Bornar would be bad for duplicity, since it joins the offenses of murder by hitting with a club and of murder by shooting with a pistol in the same count; the proper method would be to state each offense in a separate count of the information. As Clark on Criminal Procedure puts it, "Any number of counts charging the same offense in different ways may be joined in the same indictment to meet the evidence and avoid a variance in the proof." To be sure the rule against duplicity "does not prevent the charging in one count of more acts than one if such acts were all part of the transaction constituting the offense charged." *Barnes v. State*, 20 Conn. 232; *State v. Hodges*, 45 Kansas 389; but this means, as stated in *Commonwealth v. Tuck*, 20 Pick (Mass.) 360, "where two crimes are of the same nature and necessarily so connected that they may,

and, *when both are committed*, must constitute *but one legal offense*, they should be included in one charge." The familiar example given is of assault and battery; these are separate acts, and yet when both are committed they may be prosecuted in the same court, since both taken together constitute but *one legal offense*. The point of the case under discussion is: All murder by beating and murder by shooting, taken together, constitute but one legal offense. It would seem that they are separate offenses and should be charged in different counts, since each by itself constitutes a legal offense.

**DEFECTIVE HIGHWAYS—PROXIMATE CAUSE—ABSENCE OF GUARD RAIL.**—*BOONE V. EAST NORWEGIAN TOWNSHIP*, 43 Atl. Rep. 1025 (Penn.). Husband of plaintiff was driving over an unprotected declivity at side of highway, and the horse becoming frightened and kicking his leg over the wagon shaft, the team went over the unguarded declivity, and husband of plaintiff was killed. *Held*, that absence of guard rail was proximate cause of death, although horse had kicked his leg over wagon shaft.

There exist no finer distinctions than those made in the determination of proximate causes. This case is important as emphasizing certain characteristic cases concerning the doctrines of which there can now be no ambiguity. The leading case states that when several concurring acts or conditions of things, one of them a wrongful act of defendant, produce the injury which would not have been produced but for the wrongful act or omission, such act or omission is the proximate cause of the injury. *Campbell v. Stillwater*, 32 Minn. 388.

**ELECTRIC WIRES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.**—*DEVLIN ET AL. V. BEACON LIGHT CO.*, 43 Atl. Rep. 962 (Penn.). Plaintiff passing along street, stepped upon wire lying along sidewalk, which by this act of plaintiff came into contact with heavily charged wires and thus gave shock to plaintiff which caused severe injuries. *Held*, that it is negligence for Electric Light Company to leave unguarded wire lying upon street in such position that it may come into contact with heavily charged wire; also, contributory negligence must be proved and not presumed from acts of person stepping on wire.

This is one of the cases in which electrical companies are held to most rigid liability. Such a company is now held responsible for defects in insulation, non-insulation, careless constructive work, falling of poles, wires, etc. Ordinarily the rule as to negligence has embraced those cases in which a party has shown want of ordinary or reasonable care in respect to what it was the duty of the party to do or to leave undone. The prudence of the reasonable man about his own affairs was all that was required, and in the case of railroads and electric companies this degree of care would apply to the ordinary and customary apparatus of their businesses. But now the rule is extended, and electrical companies in particular must prevent the slightest possibility of injury, even though only *indirectly* caused by their apparatus, which is now considered the proximate cause. American courts are in accord on this point. The doctrine of *res ipsa loquitur* is given much weight.

**EVIDENCE—BILL OF EXCEPTIONS NOT NECESSARY TO BRING IT BEFORE THE SUPREME COURT.**—*PEOPLE V. VERRESENCKOCKCOCKHOFF*, 58 Pac. Rep. 156.—An appeal for error in instructions to the jury as to value and effect of the evidence. *Held*, that a bill of exceptions to bring up the evidence is unnecessary.

This is an interesting decision, coming from the Supreme Court of California whose opinions are generally held to be good law, because it would appear

that the weight of judicial decision had almost established the law the other way. It was objected in this case that the instructions to the jury could not be reviewed without the evidence, because it would not otherwise appear that they were improper and injurious. But the court said it would be presumed that there was evidence of some character to which the instructions would apply, and where such instructions would be erroneous "as applied to all possible evidence to which it would be applicable," then error existed. If this decision is followed the law on this point will be directly changed. In *Kelly v. Doyle*, 54 P. 394, the court said: "Alleged errors in giving instructions will not be reviewed where the abstract does not fully set forth the instructions, and the evidence on which they were based," and the rule was stated in almost identical terms in *Eickhof v. Chicago M. S. St. Ry. Co.*, 77 Ill. App. 196, thus: "The appellate court will not consider the instructions unless all the evidence upon which they were based is before it." For a similar emphatic statement of the rule see *Felmet v. Southern Exp. Co.*, 31 S. E. 722, and *Yates v. United States*, 90 Fed. 57.

**FOREIGN CORPORATIONS—SERVICE OF PROCESS UPON AGENT—***WALL V. CHESAPEAKE AND OHIO R. R. Co.*, 95 Fed. Rep. 398.—A person employed in Chicago to solicit business and give information on behalf of a foreign railroad corporation, having no power to make contracts for the company, is not an agent on whom service of process against the company can legally be made under Illinois statute.

Wood, J., dissents, arguing on the ground that the power to make contracts is not the test of agency. The decision of this case turns primarily upon the interpretation of the State statute governing the service of process. The statute does not designate with any precision who is to be such an agent, that he may be served with process. The court in deciding this case in conformity with its previous ruling in *Fairbank & Co. v. Cincinnati*, 9 U. S. Appeal 212, seems to have laid down good law in spite of the excellent reasons expressed in the opinion of the dissenting justice. A careful reading of the case of *Maxwell v. Atchison, T. & S. F. Co.*, 34 Fed. Rep. 286, which gives the law on this subject, will show that he misunderstood the facts in the case of *Block v. Atchison, T. & S. F. Co.*, 21 Fed. Rep. 529, the only authority he gives in support of his views.

**ILLEGAL CONSIDERATION—GAMING.—***ST. LOUIS FAIR ASSOCIATION V. CARMODY ET AL.*, 52, S. W. 365.—Where plaintiff, in addition to conducting lawful races had arranged booths and appliances for gambling on the races, and contracted with defendant whereby he was to furnish refreshments, thus increasing the attraction and promoting the gambling. Held, that such contract was illegal and void.

This case discusses "*illegal consideration*," and purports to base its decision on this ground. It also states the contract to be "against public policy," and this would seem to be the true ground for its invalidity. The decision, if resting upon the doctrine of illegality of consideration, would carry that to a great extent. There was nothing illegal in the specific privileges for which the defendant (appellant) contracted, and the invalidity of the contract seems to arise out of its pernicious effects, since it, in its operation, promoted an illegal act, and the presumed intention of the parties must have been that it would do this. This was the ground of the decision in the case of *Pearce v. Brooks*, 1 L. R. Exch. 213, cited by the court as referred to in *Michael v. Bacon*, 49 Mo. 475, and given weight in the opinion.

LAND BORDERING ON LAKE—ANNUAL EBB AND FLOW—*SAPP V. FRAZER ET AL.*, 26 S. Rep. 378 (La.).—The plaintiff appealed from a judgment for defendants, in which he prayed for an injunction restraining the defendants from taking grass from the bed of a lake of which the plaintiff claims riparian ownership. *Held*, that the temporary uncovering of parts of the bed of the lake by recurring annual ebb of the waters, which became covered again by their rise or flow, does not constitute dereliction.

This case is novel, yet there are decisions at variance. It is correctly held that the United States has determined that the question of whether the lands forming the beds of the waters belong to the State, or to the riparian owners, depends entirely upon the law of the State where the lands are. *Hardin v. Jordan*, 140 U. S. 371. The court in this instance held according to the Code which follows the English rule, that there could be no dereliction. *Zeller v. Yacht Club*, 34 La. An. 839.

NEGLIGENCE—ELEVATORS—DEGREE OF CARE NECESSARY. *SAVAGE V. JOSEPH H. BAULAND CO.*, 58 N. Y., Supp.—An elevator, of standard make and fully equipped with all the latest safety appliances, and regularly inspected, became stalled between the second and third floors of a building while a number of passengers were aboard. Several unsuccessful attempts were made to remove the obstruction, which proved to be a piece of bunting used in decorating the car a short time previously. The feasibility of cutting the cage was considered, but abandoned. All efforts to start the car by means of levers proved unavailing. The engineer finally sent his assistant to the top of the shaft to slacken the ropes, taking no precaution to prevent the fall of the car in case the ordinary safety appliances failed to work. The trial court submitted the question to the jury, with the statement that defendant owed plaintiff the duty of operating its elevator with the "highest degree of care and skill." There was no emergency, for the car was fast, and likely to remain so unless disturbed by considerable force. Was there such an emergency as would allow the engineer to use his best judgment as to what was necessary to avoid an accident? Had the defendant any right to try experiments without taking every precaution for the safety of the passengers? Clearly not. In *McGrell v. Building Co.*, 153 N. Y., the court says: "The requirement of the greater degree of care is dependent, not so much on the actual apprehension of danger as upon the consequences likely to result from a defect in machinery and appliances. In cases where less serious results are to be expected and in cases where danger is to be apprehended, if due and proper care is observed by the passenger, the owner is responsible only for want of ordinary and reasonable care." This, it held, applied as well to machinery and manner in which it was operated as to other causes from which injury might result. The defendant should have taken every precaution reasonably possible, and having failed in its duty must answer to those who have suffered through its negligence.

OBSTRUCTION OF SIDEWALK—NEGLIGENCE.—*TOMPKINS V. U. H. RY. CO. ET AL.*, 43 Atl. Rep. 885 (N. J.).—Plaintiff, passing in front of stables owned by one of defendants, was injured by falling of bale of hay, which had been purchased by said defendant, and was being unloaded from wagon of another of defendants. *Held*, that abutting property-owners on street have right to temporarily obstruct street for unloading of merchandise to such extent as is absolutely necessary; and are not bound to furnish safe passage around such obstruction to passers-by.

In the initial case of *Rex v. Russell*, 6 East. 437, it was declared that while a proprietor might make such use of the street as the transaction of his business demanded, yet if resulting obstruction of traffic was so often repeated as to operate as a permanent obstruction, he was liable and must

seek such place of business as would not necessitate such hindrance and menace to ordinary traffic. In this country two very similar cases enunciate the same principles: that the obstruction must occur in transaction of business, must be necessary, and must be *temporary*; that the right of obstruction must be exercised in a reasonable manner. *Welch v. Wilson*, 101 N. Y. 254; *Jochem v. Robinson*, 66 Wis. 638. This right of obstruction is so well determined that in several American cases it has been said decisively that the obstructor is under no duty of furnishing a safe passage around the obstruction.

RAILROADS—AGE AS AFFECTING CONTRIBUTORY NEGLIGENCE—*ATCHISON, T. & S. F. RY. v. HARDY*, 94, F. R. 294.—*Held*, that plaintiff, a boy of 14, could recover damages, although he was injured while negligently upon defendant's tracks.

In this case one of the most important considerations was the boy's age as determining whether he was guilty of contributory negligence. This case properly belongs to that class designated by the legal profession as "turn-table" cases and upon which there is a direct conflict of authority. The English rule, which seems to be the better, is followed by the New York Court in *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 45. The same ruling was followed in *Birge v. Gardner*, 19 Conn. 511, where the plaintiff, an infant of seven years, failed to recover for injuries sustained while trespassing on defendant's property.

SALE OF GOOD-WILL OF BUSINESS—STIPULATION AGAINST COMPETITION.—*CORWIN v. HAWKINS*, 59 N. Y. Sup. 603.—One partner, on selling his interest as a plumbing and gas-fitting business to his co-partner, agreed not to engage in that business in the same village for the term of five years. Afterward solicited plumbing for another, though he had no pecuniary interest in the business. *Held*, a violation of his contract.

The decision in this case is not based on the fact that the partner was thus secretly carrying on a business under another name, but that the solicitation of business for another is a violation of a contract not to carry on that business. The intention of the contract was to prevent the defendant from entering into and building up another similar business. Solicitation of business for another is building up business for that other, and so a violation of the contract. From the Dyer's case in 2 H. 5 (Pasch fo. 5 pl. 26), where Hull, J., lost his temper, up to a very late date, the tendency of the courts has been to allow the presumption, which exists against the validity of a contract in restraint of trade, to run also against the party receiving the benefit of the covenant of restraint. Though judging a particular contract in partial restraint valid, the remedy would be very reluctantly granted on its breach. In *Grimm v. Warner*, 45 Iowa 106, where the sale was of "the business and good-will thereof, and I agree not to engage in the ice business in Iowa City," the lower court held that "his personal employment in a rival establishment" would constitute a violation, but was overruled by the Supreme Court, which made the fact that "he had no part in bringing into existence the rival establishment" the pivotal one. But here we think a step is taken on the best grounds. A person selling the good-will agrees in substance to withdraw himself and his influence, not merely his name, from competition. When he solicits business from another he violates such agreement.

UNFAIR COMPETITION—PRELIMINARY INJUNCTIONS—*NATIONAL BISCUIT CO. v. BAKER ET AL.*, 95 Fed. Rep. 135.—"Uneeda," as applied to a biscuit, is a proper trade-mark, and the proprietor is entitled to an injunction against the use of "Iwanta" by another manufacturer as the name of a similar biscuit put up and sold to the trade in packages so similar as to deceive consumers.

This is in accordance with the decision of the United States Circuit Court in the case of *N. K. Fairbank v. Central Lard Co.*, 64 Fed. Rep. 133. The law is so plain on this subject that it is surprising to find so much litigation over it.



## BOOK REVIEWS.

**Probate Reports Annotated.** By Frank S. Rice. Volume 3. Baker, Voorhis & Co., New York, 1899. Sheep, pp. 752.

Since it is a well-known fact, unnecessarily supported by statistics, that with every generation the property of the country must pass through the hands of the Probate Courts for adjudication; and because within this ever-growing field many a lawyer has found the cream of his practice, it is safe to predict, or even assert, that from year to year, volume after volume of the above reports, as they appear, will find their way, not only upon the shelves, but constantly into the hands of every progressive practitioner of the law. Containing, as each volume does, over one hundred cases, selected from all States, which arise in Courts of Common Law and Chancery Jurisdiction, as well as in Probate Courts, together with clear, concise and self-leading head-notes, as well as carefully written annotations, the knotty questions of probate law are here reduced to the level of simplicity. To the student who wishes to familiarize himself with the latest phrases and the most important points of probate law, these reports will become invaluable. For nowhere within the field with which they deal can a superior exposition of the practical development of probate law be found than as therein appears in decisions fresh from the pens of eminent jurists.

**A Dictionary of Words and Phrases used in Ancient and Modern Law.** By Arthur English, Washington Law Book Co., Washington, D. C., 1899. Sheep, p. 979.

Mr. English, recognizing that the legal fraternity have long felt the need of a legal dictionary, which confined itself to words and definitions of those words, planned the above book. In the execution of the plan he has succeeded admirably. The book is in every sense just what it purports to be, "a dictionary of words and phrases used in ancient and modern law," containing definitions unencumbered with worthless surplusage. Its compactness of style and clear enunciation of legal terms and words in short yet accurate and complete definition, commend it to the attorney and student alike.

**A Treatise on the Law of Evidence.** By Simon Greenleaf, LL.D. Sixteenth Edition, Vol. I, revised, enlarged and annotated. By John Henry Wigmore, Professor of Law of Evidence in the Law School of Northwestern University. Little, Brown & Co., 1899. Three Volumes. Vol. I, Sheep, pp. 993.

The issuance of Vol. I of the Sixteenth Edition of Greenleaf on Evidence is a testimonial monument to the ever increasing popularity of that treatise. The main object of the new edition is to keep the book on its high plane of excellence, and to accomplish this the text of earlier editions have been carefully revised. Some parts of it have been wholly re-written by Professor Wigmore, and yet no part of Greenleaf's text has been left out or lost track of. A careful comparison of the first volume of the above edition shows a marked improvement over all previous editions. For the addition of four new chapters on the subject of Real Evidence, Relenency, Circumstantial Evidence, Exceptions to Hearsay Rule, Regular Entries in course of Business, make the book more complete and admirable than ever before. One of the marked changes, or rather we should say improvements, which the student will be quick to appreciate, is the fact that the text of the new edition states the law fully and completely, while the notes give full references to the authorities on which the law rests. The fact that Vol. I is edited by Professor Wigmore, whose many years of study of the rules of law which it illuminates will make the new edition need no recommendation to the lawyer or the student, for to quote from Greenleaf is to quote law.

# YALE LAW JOURNAL

---

Vol. IX.

NOVEMBER, 1899.

No. 2

---

## MUNICIPAL GOVERNMENT AND ITS DEMANDS UPON GOOD CITIZENSHIP.

The problems which come before the governing bodies of our large cities are as intricate and difficult of correct solution as those which come before our federal or state governments. Many of them involve perplexing business and engineering difficulties which require practical and technical treatment and demand a quality of talent quite different from, but in no way inferior, to that required in the law-making functions of these and other legislative bodies. While there is comparatively little demand in municipal government for what we call statesmanship, there is a most urgent demand for business sagacity and that practical common sense which is essential in all governments, and without which even so-called statesmanship becomes a snare and a delusion.

A brief consideration of some of the important problems of city government will call to our minds, not only the high order of ability required for their satisfactory solution, but the great importance both to life and property that such ability should be provided and such solution should be secured.

The first in importance are those which relate to public health, morals and education. It is the business of city governments to furnish good water for the people to drink; a thorough and safe sewerage system; good ventilation for school-houses and other public buildings; precautions against the spread of infectious and contagious diseases; proper inspection of milk and other food. It suppresses all forms of vice so far as possible, and especially protects the young from its contamination. It must provide the best educational facilities; the most modern and scientific methods of instruction; the best text books and most capable teachers.

A second problem, scarcely less important, is found in the fire and police protection which a city government is bound to provide. Up-to-date fire apparatus and the best possible police efficiency save lives as surely as bad water and germ laden milk destroy them.

A third problem of great importance and considerable difficulty is found in the grading, paving and care of streets and alleys. Public health demands that they shall be kept clean. The best and most durable pavements must be ascertained; good judgment is needed in determining the streets upon which new pavements should be laid and the most suitable kinds of pavements for different localities. Great diligence must be used to keep pavements in repair. A new brick or two, a new cedar block here and there, or a few shovelfuls of broken stone from time to time not only keep streets constantly in good condition, but greatly prolong the life of pavements and are as great a saving to the people as the constant repair of fences and buildings are to the farmer.

A fourth problem is found in the granting of franchises. Public necessity requires street railroads, telephones, gas and electricity. Private corporations are always ready to supply these demands, but in order to do so must have some sort of franchise extending over a period long enough to make the investment profitable. It rests with the city government to either protect the interests of the people by a wise franchise adjustment which shall insure low charges, good service and perhaps a share in the profits of the business, or to ignore the interests of the people by giving away these valuable rights and establishing pernicious monopolies. Municipal ownership, especially of lighting and water plants, furnishes another problem of no small difficulty. The propriety of municipal ownership of street railroads within the limits of the municipality is now receiving considerable public attention, and involves a question of policy which must be settled by the city government.

It is plain that the best business ability and the utmost conscientiousness to be found in the community are none too good to cope with these and other problems arising in the government of a city.

Sweeping charges of corruption and incompetence in the government of almost all our larger cities are frequently made and rarely if ever denied. Occasionally the general public experiences a violent shock from the exposure of some gigantic fraud or the bribery of some public official, but after a few days

or few weeks relapses into its chronic condition of lethargy. In the city in which I reside the president of the board of education recently charged a book publishing company with an attempt to bribe him to withhold a veto which he intended to file disapproving the action of the board in adopting a certain text book. The company demanded an investigation. A majority of the investigating committee found that the charge was substantially sustained, but a majority of the members of the board of education, without having an opportunity to hear or read the testimony, voted to adopt a whitewashing report made by a single member of the investigating committee. The newspapers then took the matter up, published all the testimony and without mercy criticised the action of the board. Citizens were surprised and shocked to learn that book publishing companies sometimes furnish money to secure the election of members of the board, pay their expenses to attend board meetings and entertain them with champagne suppers, and that while they do not always use direct bribery, they often with great ingenuity reach members by other influences which are scarcely less pernicious. It is barely possible that the public resentment against its disloyal representatives on the board may last until the next school election, but it is only a question of months at the longest when the whole matter will be forgotten. There can be no doubt but that similar iniquitous methods are common in other cities and even in small villages. The great corporations which publish school books have a strong motive in procuring their introduction. It is not merely a question of profits which may be made from the first sale, but they anticipate a continued profit from year to year as long as their books shall remain in use. The general apathy of the people with regard to the election of members of school boards renders it easy and inexpensive for the book companies to start at the very foundation and elect members in their own interest. The extent to which boards of education are thus controlled and influenced by book companies whose interests are in conflict with those of the public ought to so thoroughly alarm every citizen and taxpayer that a persistent effort would be made to correct the evil. Two important lessons may be learned from these developments: First, that not only members of school boards, but members of common councils and public officers generally, have too low a standard of morality with respect to their duty to the public. What is customary seems to them right. They forget that frequent repetition of a bad practice merely multiplies the wrong. They do not stop to think that interested

parties would not part with their money, even the small sums required for entertainment, or traveling expenses, without expecting some return, and that the only return the school trustee can make involves a sacrifice of that absolute freedom from bias which should characterize all official action. Second, that the petty corruptions which receive little or no attention are more insidious and on the whole more pernicious, because more perpetual and far reaching, than the occasional frauds of greater magnitude.

The incompetency which characterizes most of our city governments is too apparent to require much discussion. A mere glance at the business occupations of the aldermen and other officials in most of our cities should satisfy us that we are not securing such experience or ability as are necessary for good government. Many of them are mechanics and laborers who are working for day wages. Not a few are saloon keepers. They are not men whose occupations call for much mental training exercise. They are not men of business habits or experience. They are not men who would be placed upon the boards of directors of private corporations, but often are employees of such corporations. To expect such men to grapple successfully with the great problems of city government is absurd. We send a boy to do a man's job.

As to the dishonesty, inefficiency and generally deplorable condition which prevails in the government of most of our cities there is no difference of opinion. There is, however, a well defined difference of opinion among thoughtful people as to the remedy. Those who have given up all hope of material improvement under the more democratic methods which now prevail advocate the radical remedy of substituting government by small administrative boards, similar to the boards of health and boards of public works now found in most of our cities. In order to secure the full benefit of experience it is deemed advisable that the terms of office of members of these boards should not be less than four or five years, and so arranged that one member should retire each year and that his place should be filled by a new member appointed by the mayor, thus making the board practically continuous. Great stress is laid upon the character and ability of the members of these boards. It is assumed that the mayor of a large city is usually a man of more than ordinary prominence and ability, and that a sense of personal accountability and a regard for his own reputation would generally induce him to appoint men who are not wholly unfit. It is claimed that upon the board of education he would

naturally appoint men who are themselves educated, who take an interest in educational matters, and who would in an intelligent, businesslike manner conduct the business of that board; and that on the board of public works, the board of health, and the board of fire and police commissioners, he would appoint men of practical and professional experience and recognized ability. It is claimed that such men are not averse to serving the public where they are associated with others of like calibre, when the positions come to them unsought and free from the annoyance of political campaigns. It is claimed that the board system would secure the service of business men rather than politicians, and that this is both right and desirable, as there should be no politics in city government. To clinch the argument the advocates of the board system point to cities like St. Paul, which have largely adopted this plan, as examples of the good results which attend it. It must be admitted that there is much force in all of these claims, and yet the array of arguments against the board system is by no means insignificant. Briefly summarized the objections are:

1st. The danger of bad appointments. The mayor is usually a politician and is liable to use these appointments as a means of paying off political obligations.

2d. The impossibility of getting rid of bad appointees within a reasonable time.

3d. The want of direct accountability to the people, who are the real parties in interest.

4th. The concentration of power in the hands of a small number who, if disposed, may use it unworthily.

5th. The greater danger from bribery or undue influence because of the smaller number.

6th. A loss in democracy, which more than offsets the gain in efficiency.

7th. A diminution in popular interest in and discussion of public affairs and loss of the educative influence of such interest and discussion.

8th. That the mayor of a city should not have power to create a public official whose term of office should extend beyond that of his creator.

9th. That, as in a general government, we prefer a republic to an absolute monarchy, although the latter may be and in the right hands is more efficient, so in city government democracy should not be sacrificed for efficiency.

10th. That the original membership of these boards has often been provided for in the legislative acts creating

them, and is of a higher character than can be expected from subsequent appointments of the mayor, and that consequently the good service at first rendered by these boards will not be permanently maintained.

11th. That the granting of franchises, the adoption of ordinances and legislative matters generally, are entirely beyond the scope of these boards and must necessarily be left to a legislative body to be chosen by the people.

12th. That a resort to board government is "a device of despair and admission that we are not competent or willing to do the work of governing ourselves."

The National Municipal League is, at the date of this writing, in session at the city of Columbus, Ohio. A scheme of city government has been presented by a special committee previously appointed for that purpose, which embodies some ideas of practical value. It provides for the nomination of city officers by petition signed by a certain number of qualified voters. An official blanket ballot, with the names of the candidates arranged in alphabetical order under the title of the office, obliges the voter to vote separately for each candidate. Municipal accounts are placed under the general supervision of the city comptroller. "The city government consists of a mayor elected by the people for a two years' term, a council to be elected by a general ticket for a six years' term, one-third of the members being elected every two years at the time of the election of the mayor. The details of the municipal organizations are to be fixed by the council, with the exception that the council is to elect a comptroller, that all of the other city officers are to be appointed by the mayor, without a fixed term, but subject to removal by him on charges for reasons other than a political character, and that all appointments in the subordinate administrative service of the city shall be made, where practicable, as the result of a competitive examination conducted under the direction of a civil service commission, whose members are appointed by the mayor."

The nomination of candidates for city officers by the petition of voters has been tried in England and found more satisfactory than nominations by the caucus plan. It is not entirely unheard of in this country. I remember an instance, a number of years ago, when both of the leading parties nominated for the office of police judge candidates who were utterly unfit for the place. The incumbent at the time was a man of excellent character and fair ability, who failed of a renomination because of unpopularity with the liquor element and want of leniency

to criminals. A petition requesting him to stand as an independent candidate was largely signed by the business and law abiding portion of the community. This petition and his letter of acceptance were published in the newspapers, and he was elected over both of the regular candidates. It must be confessed that the nomination to city office by party caucus, in this country, has been a failure. Whether nomination by the petition of voters will succeed any better can only be determined by experience. It depends entirely upon the people. Systems will not run themselves any more than machines. The best element in the community seems to have a special dislike to attending a nominating caucus or convention. To a man of large affairs these duties seem unimportant and almost repulsive. He therefore stays away. This renders it easy for the man of little ability or unworthy motive to secure a nomination for himself. Nominations by petition would be a change, and for a time at least would work better than the present system.

The election of council members by general ticket rather than on ward tickets, as is customary, would doubtless result in securing a better grade of ability. There are some outlying wards in nearly every city in which there is scarcely an inhabitant who possesses qualities needed for good city service. The best material is usually concentrated in one or two wards. Under the plan proposed, these wards would naturally have more than their proportionate representation, while others would have none at all. This is contrary to our general representative system, and will doubtless meet with considerable opposition, especially by those who are too narrow to look beyond the limits of their ward. The idea of continuity of the common council is in the direction of efficiency, but there are serious objections to terms of office lasting so long as six years. The tendency to add to the power of the mayor is objectionable, but seems to be unavoidable in any feasible scheme to increase the efficiency of city government. It would seem, however, that the recommendation of the committee of the National Municipal League goes too far in this direction, although the civil service feature in the subordinate offices ought to meet with general approval.

In most American cities at the present time a combination of what may be called popular rule and administrative board rule has been adopted with varying degrees of success. The question is really one of *men*. The relative value of the different methods depends very largely upon their tendency to



secure the services of honest and competent officials. In the right hands we will have good city government under any of these plans, and without good management all of them will fail. No one doubts for a moment that in every city there is an abundance of men of brains and integrity. Why is it that they are so little in evidence in the city government? Is there a disposition on their part to shirk these responsibilities? It is claimed that their business and professional duties are such as to leave them little time for public service; but when we see how frequently they accept positions as directors of banks, private corporations and social clubs, and as trustees and vestrymen of churches, and how much time even the busiest of them often give to the duties of these positions, we are forced to look for some other reason for their absence from official positions in city government. I am inclined to think that they have no disposition to shirk these duties, but rather an indisposition to do the work necessary to secure nomination and election to city offices. In European cities men of this class readily accept offices in city government and render excellent service. For the most part they are elected and not appointed, the European plan of city government in general being rather more democratic than that which at present prevails in this country. A great many of our most capable business and professional men take very little interest in local politics, and even in national politics some of them take but little interest. The selection of candidates for city office is commonly made by political organizations. It naturally follows that these men of independence and brains, who acknowledge little or no party authority, should not be chosen. It is the fashion for young men who have political aspirations to look for positions in federal or state government and to regard municipal office with contempt. Viewed solely from the standpoint of their own interest, it seems to me they make a serious mistake. If they would wrestle with difficult problems; if they would acquire valuable personal experience; if they are influenced by a high sense of duty, or even if they have no better motive than a desire for public applause, they should not scorn municipal service. Careful study and sound judgment are necessary to the enactment of wise city laws as well as wise state laws. Many a great statesman has received his first law-making experience on the common council of his native city. If under present conditions there is no honor connected with the office of alderman, the young man who is made of the right stuff will find a way to put it in. The public appreciates good service and honors the man who renders

it. Good citizenship means something far higher than the mere gratification of personal vanity or the serving of personal interest. It may mean the sacrifice of personal interests to the public good. It often means the sacrifice of popular applause to the maintenance of self-respect and the approval of one's own conscience. If city government involved only questions of business interest the heavy taxpayer might justify himself by saying that he would prefer to be robbed rather than to give the necessary attention to his public duties; but other and higher interests are involved. The physical, mental and moral well-being of citizens, especially of the young and the poor who are incapable of self-protection, are at stake. Statistics show that thousands of young children die annually from the use of impure milk. Your city government has assumed the duty of milk inspection, but your neglect to properly perform your duty as a citizen has contributed to place this department of your city government in such inefficient hands that it would be far better for the public if the city government would abandon even the pretense of providing such inspection. You pay a heavy school tax and your city government professes to provide first-class educational advantages, but it furnishes inefficient teachers and provides text books which are not intelligently selected on their merits, but are adopted at the dictation of some publishing company whose motive is merely one of personal gain. Your city government professes to furnish a supply of good drinking water and sells to its citizens an article which is impregnated with filth and disease. Your city government professes to suppress or, at least repress, vice and to guard the morals of its citizens. In reality it permits the grossest immorality to walk boldly upon its streets. It is not enough for you to recognize these blots upon your city government; it is not enough for you to sit back in your easy chair and find fault with city officers who may possibly be doing their best and whose activity in public matters you might well emulate. Good citizenship demands something from all of us besides croaking and fault finding. It demands a little of our time, some of our activity. It may require us to devote a portion of our time for a year or two to some municipal office. If so, the demand should be honored. We owe it to ourselves and to posterity to overcome all obstacles and maintain sound democratic government in our cities.

EDWIN F. SWEET.

## INCORPORATION.

In these days, when legislators too often hurry to meet and yield to popular demands, without the sense of responsibility and the independent deliberation required by the theory of representative government, popular error is apt to bear fruit quickly. Danger is avoided only by the many educational influences which lead the people generally to right thinking upon matters which become subjects of popular interest. It should be, and doubtless is, one of the aims of this Review to be among such influences with respect to matters of law—not so much, perhaps, by reaching the people directly as by leading those who make the law their special study, to look at things with the eyes of common sense and to express their thoughts in common language.

The subject of corporations is, undoubtedly and for obvious reasons, one of popular interest at this time. And yet there is a deal of confusion of thought about corporations. The subject is in a sense complex and difficult. Abstruse questions arise in it. But in the main it is intelligible to common sense without very much research. There is need rather of examining what is close at hand and open to all, than of studying either the history of the past or the law of the present. Resort must be had to the statute book, since corporations are creatures of statute law. And some little reference to the past is necessary to interpret the statutes. But no more than this is needed before common sense can address itself to the main question which the subject presents, namely: What is a corporation? It is more likely to be confused than helped by searching the books for definitions. If any one doubts this, let him read the first section of "Boone on Corporations," which contains a composite definition, for the parts of which ample authority is given, and imagine himself offering this to an inquirer as an answer to the above question. It is as follows:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law; and it possesses only those properties and powers which are conferred upon it by its creator. Its existence depends upon a legislative act, to which it either mediately or immediately owes its vitality. It is a collection of individuals united into one body, having perpetual succession under the corporate name, and vested by the

policy of the law with the capacity to transact certain kinds of business like a natural person; and such a union can only be effected under a grant of privileges from the sovereign power of the State."

The effort to find out what a corporation is is embarrassed by the natural tendency to consider particular corporations with which the inquirer is especially familiar, without distinguishing between those elements of character which they have in common with others, and those which are peculiar to them or to the particular class to which they belong. Obviously only those things which are common to all corporations are to be considered.

Railroad corporations, for instance, receive and exercise important prerogative franchises, perform public functions in the place of the state, and are on that account permitted to exercise the right of eminent domain, that is, the right belonging to the sovereign to take private property for public use. The holding of such franchises involves correlative duties, and may rightly be taken into account by the State in dealing with this particular class of corporations. But it would be wrong to legislate about all corporations upon grounds based upon the holding of such franchises. Ferry companies, bridge companies, gas companies and the like, have similar franchises. But ordinary business and manufacturing companies have only the franchise of corporate existence. The State grants to them, or to those who compose them, nothing but incorporation. In determining, then, the common character of corporations, as in framing laws to operate upon them all, it is well to put out of view such as have prerogative franchises and confine the attention to purely private companies having no franchise but that of corporate being.

Again, it is a prevalent idea that corporations commonly involve an aggregation of capital of considerable magnitude. It is true that corporate organization is used for the purpose of bringing together large aggregations of capital. The magnitude of the many combinations thus effected in the last twelve months is well known. But a large capital is not essential to corporate organization. As a rule the statutes authorizing the formation of corporations either state no minimum amount of capital, or put the minimum very low indeed. And in many cases incorporation does not effect any accumulation of capital whatever; as when a partnership is practically changed into a corporation by the transfer of the partnership assets to a corporation formed by the partners. Clearly, then, ideas which

attach to corporations by which very large amounts of capital are brought together, should neither be the basis of legislation against all corporations, nor affect the answer to the general question: What is a corporation?

It is often said that corporations have no souls. Is this a peculiarity of corporations as distinguished from partnerships and unincorporated joint-stock associations? In the nature of things, a large business, belonging to an association of several persons, is run by rule, and the rules sometimes work harshly. But it makes no particular difference with respect to its treatment of its employees, or its dealings with others, whether the association is incorporated or not. How many people know as to any one of the large department stores, whether it is run by a partnership or a corporation?

And there are other characteristics of some corporations which are not common to all, nor peculiar to corporations as distinguished from associations not incorporated.

In view of the sweeping nature of some proposed legislation against corporations generally, induced by a belief in the evil effects of so-called trusts, it is pertinent to throw out here a reminder that the trusts as at first organized were unincorporated associations, and were attacked because they interfered with corporate autonomy and because they escaped the supervision to which corporations were subject.

How, then, may the common character of corporations be discovered? By examining the statutes under which they are formed. These statutes might be quite different from each other. The possibilities of legislation are great. But it so happens that, in this country, at least, statutes of incorporation, whether special charters or general incorporation laws, follow the same lines; so that in essentials the products are the same. Acts for the incorporation of railroad companies, bridge companies, ferry companies, gas companies and the like, contain, besides the provisions for incorporation, what are substantially grants of prerogative franchises, and to avoid confusion they may as well be passed by. As in biology, the simplest forms best repay the search for essentials. And the simplest forms of incorporation laws are those relating to business companies which receive from the state no franchise but the right of corporate existence. And since the general incorporation laws of the several states are as a rule drawn upon substantially the same general plan, it makes little difference whether the law of one state or another is taken up.

Take, then, the joint-stock corporation law of Connecticut.

From this law, as well as any other, the essential character of stock corporations can be discovered. And it is the stock companies, rather than the companies having no stock, which are of special interest. That law enacts that any three or more persons who shall associate by written articles, giving name, purpose, location, amount of capital stock and number of shares, to carry on any lawful business, with some exceptions, shall, upon filing their articles with the Secretary of State, become a corporation. A corporation, it appears, then, is an association of persons. But there are other associations of persons for business purposes—partnerships, syndicates and other associations resting merely on contract. If any of these associations take the benefit of this joint-stock corporation law, they become corporations. What do they gain by it? In other words—and the putting of this question as really the fundamental one, greatly clarifies the subject—what is incorporation? What is it, and of what advantage is it, to become a body corporate or corporation? Suppose that a number of persons have come together to form an association for business, and the question is raised whether or not they shall file their articles and become incorporated. Will they have any broader powers as to the business they may do? Certainly not. They can engage in any lawful business, unincorporated. Incorporated, they can do nothing more. If they desire to be able to change the business upon the agreement of less than all the associates, the articles can so provide. As to the business they may do, they rather assume a restraint than gain a greater freedom, by incorporation. And they subject themselves to the burden of making reports about their business to state officials. They do not by incorporation acquire the right to use a larger capital in their business, and as to the issue of shares and the getting of additional capital in the future, the articles may provide as fully, and perhaps with less restrictions, if the association is to remain unincorporated. The statute contains convenient provisions as to organization and management, which are carried into the articles without being expressed, if the articles are filed. But like provisions may be expressed in the articles with but little more trouble, if the association is to rest on agreement merely. Speaking generally, the association, if not incorporated, may have as broad powers, as large a capital and as much freedom of action, as if it becomes a corporation. Indeed it is under less restraint and, if its associates are of one mind, it is practically unlimited, as an individual is, as to what it may do or what it may own. Its power for good or evil as

an influence in the line of business in which it operates is quite as great.

By becoming a body corporate, the association gets simply the right to be regarded, in its legal relations, as though it were a being separate from those who compose it. That is the meaning of the phrase as determined by the usages of the past. Call it an independent entity, if you please, or a legal person. The idea is graphically set forth by these names; and the names are of value in its application. Incorporation creates the right to be regarded as a separate being. The association is an association of persons after incorporation as before. The associates and their successors, that is, in a stock corporation, the stockholders, associated together, under the articles, are the corporation. But in the relations of the association with the individual stockholders and with all outsiders, it is, when incorporated, to be dealt with and regarded as an independent body.

And from this come two results: First, that the death of the associates, or the transfer of their interests does not affect the existence of the corporation; and, second, that the individual stockholders are not chargeable with the acts or omissions of the corporation, are not liable for its debts or obligations or for the wrongs which it commits, except so far as the statute may expressly provide. The first of these results is, in many cases, the sufficient inducement to incorporation, because of the convenience of having a business so organized that many can participate in its profits, that interests may be divided and sold or bequeathed without disturbing the business itself. All this may, it is believed, be accomplished by agreement. Witness the unincorporated joint-stock companies engaged in the express business. But the statutes have been carefully worked out; and if there is any omission it can be supplied by further legislation; and so it is much more convenient to reach these ends by incorporation than by agreement merely. Still, that the same continuity of the association, the same transferability of interests could be accomplished by agreement merely, is not to be forgotten when legislation is proposed, based upon what the corporation gets from the state. But what cannot be got by agreement is the irresponsibility of the associates or stockholders for the acts or omissions of the association. Theoretically, perhaps, this might be deemed possible, because all who should have dealings with the association might conceivably so agree. But practically, it is impossible to secure this result save by the action of the state. This, then, is the chief thing which the state confers by incorporation, freedom from per-

sonal liability, or, in some cases, limitation of personal liability, for the debts and wrongs for which the association is responsible. This is common to corporations of all kinds, and is peculiar to corporations. And there is nothing else of which this can be said.

A few applications of what has been said to the suggestion made at the outset, seem appropriate.

Since freedom from, or limitation of, the personal liability of the associates is the only thing common to all corporations and peculiar to them, and it comes by grant from the state, this is the chief basis of the right and the propriety of legislative regulation of the management of incorporated companies. Authorizing the associates to do business, to invite credits, without the ordinary liability of individuals, the state is bound to concern itself with the management of their capital, which is the sole reliance, or in exceptional cases, the chief reliance, of creditors. The propriety of statutory regulations looking to good management cannot be doubted, and good management means management intelligent, effective and honest. Intelligent and effective management is intended to be secured by the common provisions that the affairs of corporations shall be managed by a board of directors limited in number. Honesty in the management is intended to be secured by various provisions holding the directors responsible, as occupying a fiduciary position, in which they are placed not merely by the act of the stockholders, but by the compulsion of the law. It may well be that improvements can be made in the statutory provisions looking to these ends.

Out of the common provision that the affairs of corporations shall be managed by a board of directors, comes a legitimate basis for regulation of management in the interest of stockholders. Stockholders, as a rule, have no voice in the management save to determine by their vote at fixed periods who the directors shall be, and to make by-laws. The power to make by-laws does not permit the general management to be taken out of the hands of the board, in which it is vested by law. Hence, in matters of regulation looking to good management—management intelligent, effective and honest—it is proper that the Legislature should consider not only the interests of outsiders who are or may become creditors, but also the interests of stockholders.

In the interest of creditors or those who may become such, provisions requiring reports to be made, revealing the financial condition of corporations, find legitimate basis; but intelli-



gent legislation of this kind will require no further publicity than the purpose requires. The interests of stockholders require only private reports to them. And as to those who may think of purchasing stock, it is doubtful whether they may not best be left to the rule of *caveat emptor*, with the additional protection as to stocks dealt in on the exchanges of the regulations which such exchanges may adopt, and with, perhaps, more stringent enactments as to misleading statements in prospectuses and the like, whether issued by corporations or not. The stock of many corporations changes hands but rarely. They are private institutions, and except for the protection of creditors, there would seem to be no reason why they should be required to make their affairs public.

Statutory provisions operating upon all corporations are not justified by reasons relating to such franchises as the franchise of operating a railroad. Legislation based upon such reasons should be limited to the particular class of corporations holding such franchises.

If large aggregations of capital are an evil against which legislation should be directed, the evil cannot be reached, completely, at least, by any legislation as to corporations, either by limiting the amount of capital or by forbidding corporations of other states to do business, if their capital is excessive. The convenience of corporate organization, aside from the benefit of freedom from or limitation of personal liability, is quite evident; but it is equally evident that associations can be formed by agreement only which can do any lawful business and have any amount of capital, and which, if composed of citizens of any state, can, under the Constitution, do business in any other state without legislative permission. If legislation against this supposed evil is possible and is wise, let it proceed directly, by declaring such aggregations unlawful, whether effected through corporate organization or otherwise, rather than change the general laws as to incorporated companies, and impair the usefulness for all purposes of this particular form of organization; since the latter course cannot prevent, although it may somewhat impede, the progress of accumulation. Possibly if the problem is thus faced, it may be seen that the supposed evil is not a real evil, or is one which cannot be reached by legislation. It may appear that the tendency to aggregation, whether to be regretted or not, is natural and irresistible, is to be regulated rather than restrained, and that it can best be regulated by encouraging the use for this purpose of corporate organization which involves state supervision.

Incorporation has undoubtedly been and now is an important means of industrial progress—useful and beneficial in the highest degree. The foolishness of wholesale denunciation of corporations and of wholesale legislation against them must be obvious to any intelligent man who applies his common sense to facts open before him. Legislative efforts should rather seek to extend the usefulness of this form of organization, to encourage associations in this way to come under the supervision of the state, to further safeguard the interests of creditors and stockholders, to impose such additional regulations as to management as will more completely secure what the law now intends, but to make the burdens and restraints as light as may be done consistently, leaving corporations as much freedom and as few shackles as possible, that they may do their utmost for the general good.

THOMAS THACHER.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,

LESLIE E. HUBBARD,

ROBERT H. GOULD,

ARCHIBALD W. POWELL,

GEORGE ZAHM.

## Associate Editors:

WILLIAM H. JACKSON,

ROBERT L. MUNGER,

CORNELIUS P. KITCHEL,

HENRY H. TOWNSHEND,

GEORGE A. MARVIN,

THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

THE school year has opened auspiciously, with an increase of three in the registration. The official figures are (figures for last year in brackets): Graduate Students, 3 [11]; Seniors, 52 [70]; Middlers, 52 [42]; Juniors, 87 [69]; Special Students, 3 [2]; total, 197 [194]. The large increase in the Junior class is especially gratifying. The only changes to be noted are that Prof. Wurts is teaching the classes in junior evidence, Mr. C. H. Harriman, '99, is Junior Quiz Master, and Dr. W. F. Foster has been chosen Secretary of the Faculty in place of Prof. Beers, whose private engagements made it impossible for him to give the time necessary for the office work. It is a source of gratification that President Hadley is giving his course of lectures on Railway Management, though the number of lectures has been reduced to six.

The school is honored in the election of Prof. Simeon E. Baldwin to the Presidency of the International Law Association, to succeed Sir Richard E. Webster, Attorney-General of England. Judge David Dudley Field is the only American who has held this position.

## FOREIGN JUDGMENTS IN ENGLISH COURTS.

We are in receipt of an important and interesting decision of the Court of Appeals of the Supreme Court of Judicature (England) reversing the decision of the Chancery Division in the case of *Sarah Elisabeth Pemberton v. Hughes*. The material facts of the case were that the plaintiff, while a resident of the State of Florida, was married there according to the laws thereof to one Erwin. Four years after the marriage Erwin sued the plaintiff for and obtained a decree of divorce. The decree stood as a final and subsisting decree. Two years later, Erwin being still alive, plaintiff married one Pemberton, and they lived together as man and wife until the death of Pemberton. Under a power to charge certain estates in England with an annuity in favor of any woman he should marry, he, by his will, made plaintiff the appointee.

The defendants, who claimed the estates, disputed the validity of the appointment, asserting that the decree of divorce was void under the laws of Florida. The ground of their contention was that the subpoena issued to Mrs. Pemberton (who was then Mrs. Erwin) did not leave ten clear days between the date of the writ and the time for appearance in the suit for divorce. The evidence showed that such irregularity in practice and procedure would in any court of Florida be considered as rendering a decree of divorce null and void. In the present case the defendants claim that there being no valid divorce, there was no valid marriage between Pemberton and his so-called wife, and that hence she had no right to the jointure granted to her under the will of Pemberton. The case was originally tried in Chancery Division before Judge Kekewich, who decided that the divorce was invalid. In his opinion he declared that the preponderance of evidence of the expert witnesses called for the defendants was undoubted in establishing that such error in the serving of the subpoena would render the decree void for want of proper jurisdiction.

The reasoning of the Court of Appeals reversing this decision may be thus summarized. It by no means follows that the judgment of the Florida court was rendered absolutely void by reason of the defect in process, or that, standing unimpeached by a higher court, it would be considered invalid in a collateral proceeding in a Florida court. Even assuming that such judgment would be considered as void in such a collateral proceeding, it does not afford a sufficient reason that the same should be considered as a nullity in an English court, which looks only for a violation of substantial justice. Provided a court has territorial competence and jurisdiction, its competence in other respects is not regarded as material by English courts. Competency of a court from an international, and not from a municipal point of view, determines the validity of a judgment, and therefore it is not dependent on the exact observance of the court's own rules of procedure. A judgment of a foreign court having jurisdiction of the parties and subject matter—i. e., having jurisdiction to summon the defendants before it, and to decide such matters as it has decided—cannot be impeached in England on its merits, although there may be an error in procedure. (According to this declaration no consideration is given to the possibility that such an error in procedure might gloss over that very essential lack of jurisdiction over either the person or subject matter.) A decree of divorce altering the status of the parties concerned, and affecting the legitimacy of their afterborn children, is much more like a judgment in rem than a judgment in personam, and, therefore, the decisions on foreign judgments in rem should be the guides in determining this case. As no collusion in obtaining the divorce is shown, there is no ground upon which an English court can refuse to recognize the validity of the decree of the Florida court.

This decision may be regarded as an indirect contradiction to the general rule regarding foreign judgments in existence at the present day, which has been given clearness and definiteness by a vast series of English and American decisions. At present it is well settled that a judgment rendered by a court of competent authority and jurisdiction is absolutely conclusive as to the merits of the controversy which it settles, and to that extent is binding upon the courts of all other States and countries, and will be recognized by them as evidence of the facts decided. Moreover, at the present day there is no distinction made between judgments in rem and judgments in personam of foreign courts, but all are given the same credit. Therefore, it has always been considered that valid judgments will be both recognized and enforced if they are of such a character as to be given recognition and enforcement in the jurisdiction where they were pronounced. But it is here that the first distinction is to be found. It must always appear that there have been proper proceedings and notice to the parties in order to give the judgment conclusiveness in a foreign jurisdiction. *Bradstreet v. Neptune Ins. Co.*, 3 Sumner (U. S.) 600, is the earliest case of authority in this country. Furthermore, there has never been any doubt of recent years that a foreign judgment may under all circumstances be impeached for want of jurisdiction, either over the person or the subject matter, and in this country the rule is not changed, even by the "full faith and credit" clause in the United States Constitution. These questions were all gone into very thoroughly by the counsel on either side in the trial of this case in the Court of Appeals, yet with the result that the court unanimously handed down the decision finding that a judgment pronounced by a foreign court will be considered final in English courts, and that English courts will never investigate the propriety or validity of the proceedings of such court unless they offend against English views of substantial justice. Consequently a judgment, though void in law in the country where it is pronounced, will not necessarily be so regarded in England. There is no doubt that neither the court nor the counsel on either side were in agreement as to the principles laid down in the leading cases cited, viz.: *Vanquelin v. Bouard*, 15 C. B. N. S. 341; *Castrique v. Imrie*, 23 L. T. Rep. 48; *Dogliani v. Crispin*, 15 L. T. Rep. 44.

Lindley, M. R., said in part: "The court which pronounced the decree ought to be credited with knowing what irregularities, if any, were fatal to its jurisdiction and what were not, and the court had before it all the materials necessary for forming a judgment, and oversight or carelessness ought not to be presumed by us. \* \* \* Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it is pronounced. But this paradox disappears when the principles on which English courts act in regarding or disregarding foreign judgments are borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings of a foreign court, unless they offend against English views of substantial justice. Where no substantial justice, according to English notions, is offended, all that English courts look to are the finality of the judgment and the jurisdiction of the court in this sense and to this extent, viz., its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it."

It would seem very much as if the distinction here introduced is so subtle and so without foundation as to have perverted the proper application of the general principles hitherto applied to the recognition of foreign judgments. The learned judge, whose opinion has just been quoted, himself admitted in another place that the courts of England do not enforce foreign judgments of courts which have no jurisdiction in the sense above explained, i. e., over the subject matter or the persons brought before them, but claims that the jurisdiction which alone is important is the territorial competence over the subject matter and the parties. If this were true any or all of the essential points of procedure in courts of law might be omitted or only partially performed, and yet a decree of the court would be considered valid. The truth of the matter seems to be that the existing, valid jurisdiction of any court is territorial in nature, and in any case is dependent upon the established procedure and the statutory enactments governing that court whose jurisdiction is under investigation. This being so, any defect of a technical nature will render the jurisdiction of the court *void*, and any decree under such void jurisdiction *absolutely invalid*. Justice Lindley, citing the cases of *Castrique v. Imrie*, 23 L. T. Rep. 48, and *Messina v. Petrocchino*, 26 L. T. Rep. 561, reiterates the proposition that a judgment of a foreign court cannot be impeached on its *merits*, but seems to stop there, and omits to notice that both those cases acknowledge in common with *Schibsy v. Westenholz*, 24 L. T. Rep. 93, that the jurisdiction of the court of a foreign country may always be inquired into in order to ascertain whether the laws of the State were conformed to in making the decree of court, or whether it was unduly or irregularly obtained. If these latter facts appear, the judgment in question is considered null and void. The English cases, too numerous to mention by name, which were cited as authority for the view that "English courts are bound to receive a judgment of a foreign court without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced," are by no means in contradiction to the leading case of *Phillips v. Hunter*, 2 H. Bl. 402, in which Lord Chief Justice Eyre draws the very distinction which escapes, apparently, the attention of Justice Lindley, and which was the basis of the general rule prevailing until the present case. Justice Eyre said in part, "In one way only is the sentence or judgment of the court of a foreign State examinable in our courts, and that is when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign State is, and whether the judgment is warranted by that law." In brief, if it is proved that a foreign judgment is invalid because of some defect in procedure or in practice, the judgment is considered as not being in existence, and evidence substantiating this is always admissible in a court of another country. But if no such claim is made the verity of the judgment will stand unimpeached, as would the present judgment of the court of Florida, had not the question of the non-existence of the judgment as a judgment been raised. The only way in which, under the prevailing rule, the defendants could have been estopped from disputing the validity of the decree of divorce would have been on the ground that they were parties to the proceeding in Florida, and as this was not the fact, a refusal of the court to receive evidence adverse to the validity of the decree is inherently in opposition to the rule prevailing up to the present time.

The fundamental consideration upon which has rested the right to attack

the jurisdictional power of a foreign court has been that otherwise a citizen of one country could not avoid the effect of a judgment rendered by such court, when same is brought up in a proceeding in another court, without going back into such foreign jurisdiction, and there have the same reversed. This has never been required by English or American courts. Thus when Justice Lindley asserts that the errors of the Florida court should have been rectified by impeachment in Florida, he seeks to invoke a duty never before recognized by English courts.

#### RIGHT TO ENJOYMENT OF STREAM—PERCOLATING WATERS.

The Court of Appeals of New York extends the rights of riparian owners in *Smith v. Brooklyn*, 54 N. E. 787. Smith owned land on which there was and had been a pond and natural water-course. The city of Brooklyn, to secure water for municipal purposes, established, on land of its own, at a distance of about 2,400 feet, an aqueduct and reservoir, which it supplied with water by means of a conduit and a system of wells, pumped by powerful steam-suction pumps. When the conduit was laid the stream failed perceptibly, and when the pumping station was put in operation disappeared. Both stream and pond have remained dry ever since. The jury found that the acts of the defendant had caused the disappearance of the pond and water-course. In final affirmance, the Court of Appeals, all concurring and speaking by Gray, J., says: "The right of this plaintiff to the enjoyment of his running stream and to his pond was absolute. The diversion of the water therefrom was established as a fact by the verdict, and the right of the former to maintain the action for the recovery of damages was clear."

The doctrine that the owner of land has it to the sky and the lowest depths was very clearly modified as to water-courses in *Skury v. Piggott*, 3 Bust. 339, where Whitlock, J., says: "Ways or commons \* \* \* may become extinct by unity of possession, because the greater benefit shall drown the less. \* \* \* but a water-course doth begin *ex jure naturæ*, and cannot be averted." But *Acton v. Blundell*, 12 M. & W. 324, denied the right or interest of the owner of land, through which water flowed in a subterranean course, sufficient to enable him to bring action for its diversion by an adjacent owner. Where, however, these subterranean waters are the principal or only source of supply of a water-course on his land, what are the rights of the parties? *Greenleaf v. Francis*, 18 Pick 117, held the right of the first owner paramount, "unless he was actuated by a mere malicious intent to deprive his neighbor of the water without a benefit to himself." *Parker v. B. & M. R.*, 3 Cush. 107. The next distinction made was between a subterranean flow of water so well defined as to constitute a regular and constant stream and percolations. The former were capable of a right of enjoyment in the person on whose land they issued as a spring and could not be diverted. *Smith v. Adams*, 6 Paige 435. But the owner of land had no right of action against a neighboring owner who diverted, without malice or negligence, the mere percolations of his own land, even though a spring was destroyed thereby. *Wheatly v. Baugh*, 25 Pa. St. 528. It does not follow that each land owner has the entire and unqualified ownership of all water found in his soil, not gathered into natural water-courses in the common acceptance of that term. The rights of each land-owner being similar, and his enjoyment dependent upon the action of other land-owners, these rights must be valueless unless exercised with reference to each other, and are correlative. Each is restricted, therefore, to a reasonable exercise of his own rights and a reasonable use of his own property. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569.

This was the basis of the decision of Hatch, J. (in 18 App. Div. Rep. 341), and we think it a sound one. The maxim, *Sic utere vo.*, etc., applied to the facts, harmonizes the American cases. The English cases refuse to apply this doctrine to percolating waters where the rights of riparian owners in a defined water-course are not involved. *Chaseman v. Richards*, 7 H. L. 349; *Bradford v. Pickles*, 1895 Appeal Cases 587.

Civilization must move from absolute individual rights and absolute ownership to correlative rights and ownership reasonably restricted. While, therefore, we approve the decision of the case upon the facts found by the verdict, we question the propriety of stating an "absolute right of enjoyment" in a water-course, unless it is used in the sense of vested or individual. *U. S. v. Northway*, 17 Fed. Rep. 65. The plaintiff had rights in his stream, the city of Brooklyn had rights in the percolations of its land. When it was established that these percolations fed almost exclusively the plaintiff's stream, their rights became correlative and the city was bound to show that its acts were a reasonable use of its land with due care.

#### GEOGRAPHICAL NAMES AS TRADE-MARKS.

In *Canal Co. v. Clark*, 13 Wall. 311, we find the general law as to the use of geographical names for trade-marks laid down that no one can apply the name of a geographical district to a well known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation. Until lately no exception to this general rule has been recognized as established law in this country. The United States Circuit Court for the Southern District of New York, however, has recently handed down a decision in the case of *American Waltham Watch Co. v. Sandman*, 96 Fed. 330, that considerably modifies the views formerly held on this point. In this case the defendant began the manufacture of watches in Waltham under the name of "Columbia Watch Company" and stamped his watches with the name of this fictitious corporation and the words, "Waltham, Mass." His object in locating at this place was for the avowed purpose of using the name "Waltham" in order that he might thereby reap the benefits of the labor of the original Waltham Watch Company, who had succeeded in making the "Waltham watch" known the world over. In a suit in equity for an accounting and an injunction, a decree was entered in favor of the plaintiff. The court in reaching this conclusion recognizes that a geographical name may acquire a secondary meaning that entitles it to the protection of the law. By long use and association with the manufacture of an article it may come to be a means of designating that article and as such acquire the value and invoke the protection accorded to a trade-mark. We find this point arising in the case of *Sexio v. Provesende*, L. R. I. Ch. 192, but not until the case of *Montgomery v. Thompson*, 1891 App. Cases 217, was it very fully discussed. The Massachusetts Supreme Court followed this latter case in *Waltham Watch Co. v. United States Watch Co.*, 53 N. E. 141, and the reasoning there of Judges Knowlton and Holmes seems to have had great influence upon the circuit court in the present case. The case before us is important as tending to establish a line between meritorious claims that have come into conflict. The principle that one can not appropriate a geographical name as against any one else manufacturing a similar article in the same place is a just one. But should even a right as strong as this be allowed to cover an intentional fraud on the public? It is the protection of the public that is aimed at. Not being in a favorable position to protect itself, the court considers its protection a duty incumbent upon it, and that a greater injustice would be done if it did not afford such protection than if it merely set limits upon a well established rule of law. The element of intentional fraud upon the public is the feature that the courts have grasped in order to set this limit, and a stronger one it would be hard to



find. As the law reaches a higher development, the establishment of limits to general principles become its predominant feature, and the present case is simply an illustration of this tendency.

#### CONSTITUTIONAL INTERPRETATION—INHERITANCE TAX.

That an inheritance tax is constitutional has long since been affirmatively decided by the great weight of authority. But the opinion handed down by the court in *In re Stanford's Estate*, 58 Pac. 462, is not only instructive, but settles for California, at least, that such tax, though it never came into the possession of the State, but was due the State, belongs to the State; and decides that a legislative act exempting individuals and certain private corporations from the payment of this tax is void, as being in direct conflict with the State constitution, prohibiting the Legislature from making a gift of any public money or thing of value. (Overruling *In re Stanford's Estate*, 54 Pac. 259.) The facts in this case were as follows: Leland Stanford by his will left large legacies in favor of the Leland Stanford Junior University and to certain of his nephews and nieces. A few days previous to Stanford's death a legislative enactment went into effect which provided for the payment of a collateral inheritance tax on property devised to certain classes. The tax so imposed was to become due and payable at decedent's death. In April, 1896, the Superior Court of San Francisco made an order on Stanford's executrix, requiring her to make payment of the tax due on the collateral bequests under the will. From this order an appeal was taken. In 1897 the Legislature amended the original act by exempting from such tax certain persons and classes (under which certain legatees under the Stanford will were included), and provided that such exemptions "shall apply to all property which has passed by will, succession or transfer since the approval of the act of which this act is amendatory, except in cases where taxes have been paid."

On the hearing of the appeal (54 Pac. 259) it was held that such appeal must be determined in accordance with the amendment, and that inasmuch as the amendment in question extended to every part of the State and applied to every person within a class, the same was in effect a general law and therefore did not conflict with the constitutional provision which in terms applied only to local or special laws. In the case under review the court, however, reaches a different conclusion, and hold that though in form the act in question may not be local or special legislation, yet the framers of the constitution, and the people who adopted it, did not hedge about the Legislature with such restraints in the matter of conferring favors, or making gifts or donations by special and local legislation, and at the same time leave the door wide open for similar abuses to enter under the guise of general legislation.

A contention was made that as the State had not come into possession of the tax, there could be no violation of such constitutional provision, inasmuch as the State could not give what it had never possessed. The fallacy of such contention is apparent when considered from the standpoint that it is only by virtue of statute that an heir is entitled to receive any of his ancestors' estate, and that it is in the power of the Legislature to provide that the whole or only a portion shall go to the heirs or other beneficiaries upon the death of the ancestor. This being so, and as all the property of a decedent must vest in some one at his death, if the law provides that only a certain portion can go to the heirs or other beneficiaries, the remainder being reserved to the State as a tax on the right of succession, it of necessity follows that such remainder must vest in the State at the same time that the other property vested in the heirs or beneficiaries. The State, therefore, has a present fixed right of future enjoyment to such a tax, and this is property or a thing of value belonging to the State. It is not possession alone, but the right to possess, which constitutes ownership. Inasmuch as the State's right to such a tax after it is due is property, it seems apparent that any legislation which releases such right would be in conflict with a constitutional provision forbidding the releasing or extinguishing of the indebtedness, liability or obligation to the State.

It would also seem to the average mind a pernicious piece of legislation to exempt those who had not paid the tax and not to exempt those who had complied with the law, as it would appear to set a premium upon the non-fulfillment of an obligation and the imposing of a penalty upon those who obeyed such a statute.

## RECENT CASES.

**CONSPIRACY—OBVIOUS FRAUD—PEOPLE v. GILMAN**, 80 N. W. 4 (Mich.).—In a prosecution for conspiracy to defraud the public by pretending to be a spiritualistic medium and give séances it was *held* to be immaterial that the evidence was obtained by a detective who paid his fee without being deceived by the imposture. The conspiracy was complete when formed.

In this case the court does not decide that all persons who claim to be mediums are impostors and liable to prosecution, for the facts proved of themselves that the defendant was not a bona fide spiritualist. It is hard to see on what grounds a court could pronounce spiritualism a humbug, provided the parties concerned actually believed in it. No court ought to dictate what a man shall hold as a religion or ethical tenet, nor should it pronounce any honest belief in these matters unworthy of a man of ordinary intelligence.

**CONTRACTS—REFORMATION—EQUITY JURISDICTION—RAILWAY ADVERTISING CO. v. STANDARD ROCK CANDY CO.**, 60 N. Y. Sup. 228 (Supreme Court, Appellate Term).—Plaintiff sued in a municipal court on a contract providing that defendant should pay plaintiff \$112.20 per month for placing defendants' advertising placards in the street cars of certain cities. It appeared that both parties agreed that the sum paid for such advertising should be the same as that paid under a former contract in another city, \$102 per month, and that the larger sum appeared in the latter contract by mistake. The court instructed the jury that, if they found from the evidence that it was the understanding that defendant was to spend as much under the latter contract as under the earlier, they should find a verdict for plaintiff in the sum of \$102 and interest. *Held*, "that the instruction did not assume the exercise of equity power, and virtually allow a reformation of the contract sued on and a recovery after reformation, and was not erroneous, when the parties had litigated the question as to what the contract was, without objection." MacLean, J., dissented from this opinion.

The charge to the jury and their subsequent finding would seem to be in error, because the defendant, by its answer set up no other contract than the one declared on in the complaint, for \$112.20, nor did any other appear in the pleadings. The charge and finding seem to be a virtual assumption of equity powers, apparently recognizing the plaintiff's right of recovery upon the contract sued upon, but really reforming that contract because of a mutual mistake therein, and then allowing recovery on the reformed contract. This was extra jurisdiction. *Fence v. Ellsworth*, (Com. Pl.) 19 N. Y. Sup. 659. Reformation is a purely equitable remedy, and it is hard to see how it can be granted in a case where a plaintiff does not ask for it, but sues in his common law rights under a contract, even if it be in a Code State.

"Even if it be not, in effect, reformation," says MacLean, J., "then it must be conceded to be a recovery upon a cause of action not pleaded, and we may say as was said in *Reed v. McConnell*, 133 N. Y. 433, 31 N. E. 22. 'This recovery was in violation of the rule that no judgment can be sustained in favor of a plaintiff on a cause of action not alleged in the complaint unless the defendant, by his silence or conduct, acquiesced in the trial of the new and different cause of action.'"

The majority of the court base their affirmance of the judgment, *first*, "upon the liberality, almost informality of practice sanctioned in the municipal court; *second*, upon the provisions of Section 3063 of the Code of Civil Procedure, and *third*, upon the fact that the parties had, without objection,

litigated the question as to what the contract was." Code Civ. Proc., § 3063, provides that the Appellate Court must render justice according to the justice of the case, and without regard to technical defects, which do not affect the merits, and that it may reverse or affirm a judgment for errors of law or fact. It is hard to see what application this has to the case under discussion, since there would be no injustice in compelling recourse to the remedy of reformation before bringing suit, and since it can hardly be regarded as a technical defect for suit to be brought on one cause of action and recovery had under another. The cogency of the third reason, namely, that the parties had been allowed to litigate what the contract really was, is not apparent. All the testimony on this point could only serve to show that there had been a mutual mistake as to the contract, that the real contract was something different from that which appeared in the written instrument, and that there was need of the equitable remedy of reformation.

**EASEMENTS—RIGHTS OF MORTGAGEE—COMPENSATION—FERNIE V. CHICAGO, R. I. & P. Ry. Co., 58 Pac. 492 (Kansas).**—A mortgagor of land granted the right of way to a railroad company without the consent of the mortgagee, and without any proceeding to condemn the land. *Held*, that a purchaser at a foreclosure sale under the mortgage or his grantee may sue the company for compensation, but cannot recover damages incident to the entry before he acquired title to the land.

This case seems to be correct on principle. *Perkins v. Pitts*, 11 Mass. 125, *Meriam v. Brown*, 128 Mass., 391, is an almost parallel case, holding as in the present case that the rails were real fixtures and became a part of the land. Although this is, without doubt, good law, there are decisions to the contrary. *Black River & Morristown Ry. Co. v. Barnard*, 16 N. Y. 104; *Cohen v. St. L., Ft. S. & W. Ry. Co.*, 34 Kan. 158.

**EVIDENCE—REQUIRING PRODUCTION OF DOCUMENTS—IN RE COMINGORE, COLLECTOR, 96 Fed. 552.**—The reports made by a distiller, or by a storekeeper or other officers to a collector under the internal revenue laws are in no sense public records, and cannot be produced in court as evidence.

The question here hinges on the public nature of the storekeeper's report. If they are made "for the benefit of the public" (1 Greenl., Sec. 483), it would seem that the State officials' call for them as evidence should be respected. If they are the private property of the government, the Secretary of the Treasury has undoubtedly the right to order them refused as evidence. Their purpose is to give the collector information as to the quantity of distilled spirits in the warehouse, and they are not open to the public. But cases can be imagined where the public would be benefited by knowing such reports. There is nothing in them which the distiller has a right to demand should be secret, nor anything which can injure the public welfare or interest. And it has been held *In re Hirsch*, 74 Fed. 928, that a collector must give as evidence the application of a person for a license. The weight of authority, however, seems to be with the court in the present case. *In re Huttman*, 70 Fed. 699; *In re Weeks*, 82 Fed. 729.

**EVIDENCE—WILLS—MENTAL CAPACITY—POWERS EX'R. ET AL. V. POWERS ET AL., 52 S. W. 845 (Ky.).**—Evidence was offered as to the amount of property the testator had at a considerable time before his death and that he had a much less amount at his death. *Held*, that perhaps such evidence was admissible as showing the testator had not the mental capacity to make a will.

There seems to have been some doubt in the mind of the court as to the admissibility of this evidence and it is improbable that the decision will be anywhere followed. Such evidence is extremely remote from the issue and, by itself, of almost no effect, since the law has long been established that bad management or waste of an estate or want of understanding to transact even the ordinary business of life does not affect testamentary capacity. *Whitney v. Twombly*, 136 Mass. 145; *Hall v. Hall*, 17 Pick. (Mass.) 373.

**FRATERNAL COLLEGE SOCIETIES—EXPULSION OF SUBORDINATE CHAPTERS—**  
**INJUNCTION—HEATON ET AL. V. HULL ET AL., 59 N. Y. Sup. 281.**—Charges were brought against a chapter of a college fraternal organization by its president because of lack of culture and refinement among the women of the college. No proof was offered that any rule of the order was broken except the exhibition of the constitution to counsel by a member of the order. No causes for expulsion are provided for by the constitution. Nor was any chance given the chapter to defend itself against the charges. *Held*, the court would enjoin consummation of the expulsion.

In the absence of defined regulations as to the causes for expulsion, it would seem that the ordinary principles of justice would govern. In *People v. N. Y. Produce Exchange*, 149 N. Y. 401, it was held that the causes of suspension and expulsion must be stated with reasonable certainty in the notice and the cause for action must be within the scope of the by-laws. But this case refers mainly to membership in corporations, but no distinction is recognized between corporations and voluntary unincorporated associations. The chief value of membership and association with members of other chapters of fraternal organizations lies in the initiation by a chapter of good standing, and the continuance of privileges as members of the local chapter. When that value has been destroyed, the blow comes home directly to all those who have become members of the local chapter, and so their individual rights would apparently be invaded.

**GAS COMPANIES—DISCRIMINATION—BAILEY V. FAYETTE GAS-FUEL CO., 44 Atl. 251 (Penn.).**—*Held*, that a company incorporated for the purpose of supplying gas both for heating and lighting cannot discriminate by charging more for gas for lighting than for heating.

Unlawful discrimination is a term generally used to indicate a breach of a statutory or common-law duty to treat all customers alike, i. e., there must be no discrimination if there is an equality of conditions with respect to all customers affected. The American doctrine of legislative control over the rates of warehousemen is well settled in the case of *Munn v. Illinois*, 94 U. S., 113, and has of late years been applied to the regulation of the rates of gas companies, but with recognition of the fact that such control is not arbitrary and is always subject to judicial determination. The justification of such legislative control is the quasi-public nature of warehousemen, railroad, gas, ferry and bridge companies. In the case in question the conditions under which the customers were supplied were both similar and equal, and the only ground for discrimination was the differing value of the service to the customer, i. e., that the furnishing of gas for lighting was more valuable to the customer than the furnishing of gas for heating. Discrimination based on such grounds has never been sustained in cases of companies of another nature, and now for the first time it is decided that gas companies cannot charge varying rates for differing uses of the same kind of gas. Many gas companies in the different States have made such a distinction in charges, and if the courts of other States hold in accordance with the principal case these companies will be most markedly affected. The decision seems based on a logical interpretation of the doctrine of unfair rates and will in all probability be sustained by future cases.

**HIGHWAYS—REASONABLE USE BY OWNER OF THE LAND—NUISANCE—**  
**LYMAN V. HOOPER, 44 Atl. 127 (Me.).**

While it is true that adjacent owner, owning presumptively to the center of a highway, may, subject to the public easement, make a reasonable use of the land even within the location, yet a stack of hay with a white half cap, the corners of which are unfastened and flapping in the wind, placed within the highway about three feet from traveled part, is an object of such a character as will naturally frighten horses ordinarily gentle and well broken, and therefore is not a reasonable use, but constitutes a nuisance. Most of the cases of injury incurred on highways are against the municipalities for maintaining a nuisance or permitting an abutting owner to do so. In *Murray v. McShane*, 52 Md. 217, the same rule of law was applied; the owner of land on which was

a ruinous wall, which was declared a nuisance, being held liable. *Regina v. Watts*, 1 Salk. 357, and *Mullen v. St. John*, 57 N. Y. 567, is decided on same ground.

**LEASE—WHAT CONSTITUTES—***GOLDMAN v. NEW YORK ADVERTISING CO.*, 60 N. Y. Sup. 275.—The relation of landlord and tenant is not created where for compensation one person gives another authority to use the wall of a house for advertising purposes for a specified time.

Both appellant and defendant invoke legal principles that obtain between landlord and tenant. The relation of landlord and tenant did not exist, as the contract between the parties was not one for the possession and profits of lands or tenements neither was it for the possession or right of possession to the realty. In *Lowell v. Strahan*, 145 Mass. 1, it was held that affixing a sign to the wall in consideration of an annual payment was a license, and not a lease. It was permission to do a particular act, and gave no authority to do any other act upon the premises.

**MASTER AND SERVANT—GROUNDS FOR DISCHARGE—EMPLOYERS' GOOD FAITH—MISCONDUCT—CONTRACT OF EMPLOYMENT—EMPLOYEE'S RIGHTS—***ALLEN v. AYLESWORTH ET AL.*, 44 Atl. 178 (N. J.).—An employee whose faithful service was sought by execution of a bond in his favor for an additional remuneration in event of such faithful service, was discharged for endeavoring to make secret examination of the employers' books. *Held*, that this was a breach of contract on part of employee, and employers were entitled to discharge him.

The court thoroughly exploits the right of a master to discharge an employee on grounds all of which are not assigned at time of discharge. This matter is well settled, for a master is never under obligation to assign any reason for dismissal of a servant, provided he can show that good and sufficient cause for dismissal existed at the time of discharge; *Sterling Emory Wheel Co. v. Magee*, 40 Ill. App. 340, and further reasons for discharge may be assigned even though *unknown* to master at the time the discharge was made. *Odenseal v. Heung*, 70 Miss. 172. This is now the general American doctrine. In the present case, the original cause for dismissal was the unauthorized and clandestine examination of the master's books, and this is held to be adequate cause for discharge as a breach of an implied condition of employment. There are cases in which the betrayal of the employers' secrets of trade was good ground for discharge, but the present case seems without precedent, as there was simply an endeavor to acquire the trade secrets of the employers. The court seems to apply the general rule correctly, as such an act would be a breach of a contract for good and faithful service. Further, it is held that the anticipation by the master of disobedience to orders by the servant does not constitute bad faith on the part of master in discharging such employee for the unauthorized examination of books. *Smith, Master and Servant*, p. 150, 151.

**MUNICIPAL CORPORATIONS—ACTION FOR PERSONAL INJURIES—LIABILITY FOR ACTS OF STREET CLEANING DEPARTMENT—***MISSENS ET AL. v. MAYOR, ETC., OF THE CITY OF NEW YORK*, 54 N. E. 744 (N. Y.).—The negligence of the driver of an ash cart, employed in the street cleaning department, caused the death of plaintiff's intestate. *Held*, that the city was liable, as it was acting in its private capacity as distinguished from its governmental functions.

Judges O'Brien and Gray dissent and follow the doctrine of *Maxmilian v. Mayor, etc.*, 62 N. Y. 160, and *Ham v. Mayor, etc.*, 70 N. Y. 459. These two cases have been authoritative until reversed by the present case. While it is well settled that the city cannot be held liable while exercising its governmental functions, there is a conflict as to when the city is so acting. In *Jewett v. City of New Haven*, 38 Conn. 368, it was held that the fire department, established and organized under the provisions of the city charter, while engaged in extinguishing fires, was performing a public, governmental act, and that the city could not be held liable for injuries received through the negligence

or misconduct of such department. In *Hill v. City of Boston*, 122 Mass. 344, it was held that a child attending a public school in a schoolhouse provided by a city pursuant to a duty imposed upon it by the general laws, could not maintain action against the city for an injury caused by reason of the unsafe condition of a staircase over which he was passing. In *Barnes v. District of Columbia*, 91 U. S. 540, it was held that a city was responsible for an injury caused owing to the defective condition of a street.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUIRK v. SIEGEL-COOPER CO., 60 N. Y. Sup. 228 (Supreme Court, Appellate Division, Second Department).—*Held*, "The placing of a slippery slide in the middle of a section of stairway over which customers were invited to ascend and descend, in such a way as not to be likely to attract the attention of shoppers familiar with the stairway, and without any means being adopted to warn such customers, is negligence. Evidence that plaintiff, who was injured by slipping on the slide, had passed down such stairway the day before, when no slide was there, and that there was nothing to suggest danger unless she had looked directly where she intended to place her foot, and the light was somewhat obscured, is sufficient to sustain a finding that she was not guilty of contributory negligence."

The general rule of a storekeeper towards customers invited into his store to trade is to exercise reasonable care to keep the building safe for the use of such customers, and under it the placing of a *permanent* slide over such a flight of steps would not appear to be such lack of care as to amount to negligence, since the slide would be visible to one ordinarily watchful of his movements, and since, per statement of facts, there was abundant room to descend the steps without going upon the slide. Nor would the temporary occupation of a portion of the steps by a slide for trucks be wrongful *in itself*. The ground of the court in holding the defendant guilty of negligence lay in the fact that the obstruction was temporary, "and so nearly on a level with the steps as not to be likely to attract the attention of shoppers familiar with the stairs, but having no previous experience of any such obstruction upon them. The defendant should have adopted some method of warning customers of the presence of the obstacle."

In regard to the question of contributory negligence on the part of plaintiff, the fact that the slide was temporary and had not been there when plaintiff passed the same stairs the day before, was conclusive in determining that plaintiff was not negligent. Ordinarily a person who exercises ordinary care is bound to look where he sets his foot, but in a case such as this, where the surroundings are familiar and there is *nothing to lead the passer to suppose that the premises have been altered*, ordinary care would not demand an inspection of the locality. "Contributory negligence is not always the consequence of failure to exercise the greatest prudence or to make use of the best judgment." *McRichards v. Flint*, 114 N. Y. 222, 21 N. E. 153. Because of the low level of the slide and the obscured light there was no indication of danger unless the plaintiff looked directly where she intended to step, and from this close inspection she was excused because she was familiar with the steps and they had not been obstructed when she last used them.

PATENTS—VALIDITY—INVENTIONS IN FOREIGN COUNTRY—HANIFEN v. PRICE, 96 Fed. 435.—One who has made an invention in a foreign country, and has introduced the article into commercial use there before the granting of any foreign patent or the description of the invention in any publication, may, upon obtaining a patent in this country, carry back the date of his invention to the actual time of making such invention in a foreign country so as to overcome the defense of prior use in this country.

This is a new point, and although this decision of the circuit court upholds the view previously taken on the same subject in *Hanifen v. E. H. Godshalk Co.*, 78 Fed. 811, we may expect to find still further adjudication on it. It seems to be decided on the principle in *Seymour v. Osborne*, 11 Wall. 516,

555, that an invention patented here is not to be defeated by a prior foreign patent, provided nothing has been done which enables one in this country to practice the invention without making experiments. The granting of a patent here is independent of what may have been done abroad, if the article is not in general use by the American public.

**RAILROADS—WATCHMAN AT CROSSING—ACCIDENT TO DEAF PERSON—PISKOROWSKI v. DETROIT, G. H. & M. R. R. Co., 80 M. W. 241 (Mich.)**—A deaf man walking along a railroad track attempted to cross the same at a street crossing where a flagman was stationed to give warning of the approach of trains. Before starting across he had been hailed by workmen on an approaching hand-car, but failed to hear their call and was injured by the car in consequence. He had no warning from the flagman of the hand-car's approach. *Held*, that no negligence could be imputed to the company because of the flagman's neglect to warn, when he did not know that the injured man was deaf.

This seems to be a strange and not altogether correct decision in view of the general rule that a person injured while crossing a railroad track at a street crossing has a right to rely, as the plaintiff did, on the flagman to give him notice of the approach of trains. Cf. *Richmond v. R. R. Co.*, 87 Mich. 374, where plaintiff recovered damages because the necessity of a warning was apparent to the flagman, but he neglected the duty of giving notice of an approaching train.

The fact that the operators of the hand-car gave warning ought not to excuse the flagman from doing the same, for it would seem to be as much his duty to give notice of the approach of a hand-car as to warn persons of an oncoming locomotive or train, and this duty should exist irrespective of whether the men on the hand-car gave notice or not. The placing of flagmen at street crossings in populous districts is an additional safeguard required, besides the warning signals from trains themselves.

**RESTRAINT OF TRADE—EXTENT TO WHICH ALLOWED—SADDLERY HARDWARE Co. v. HILLSBORO MILLS, 44 Atl. 300 (N. H.)**—Defendant agreed in writing to sell and ship to plaintiff 622 blankets of different styles, at prices specified and "not to sell blankets to anyone else in New York City." There was no limitation as to time. *Held*, the contract being in restraint of trade, is not to be extended by construction beyond the fair and natural import of the language used, and that agreement will continue only for such length of time as will afford the buyer a reasonable opportunity for disposing of the goods in the usual course of trade with the exercise of due diligence.

This principle of construction shows the disfavor in which the law still holds contracts in restraint of trade. As was said in a New York case, *Greenfield v. Gilman*, (140 N. Y. 168), "while the law, to a certain extent, tolerates contracts in restraint of trade or business, and will uphold them, they are not to be treated with special indulgence." The same principle was applied in determining the territorial limits in which contracts operated as a restraint in *Smith v. Martin*, 80 Ind. 260, and in *Roller v. Ott* 14 Kan. 609, it was said provisions of such a contract should not be extended by construction or implication beyond what their terms clearly require. *Harkinson's Appeal*, 78 Pa St. 196, is to the same effect.

**SHIPPING—TEST OF MASTER—LIABILITY OF OWNERS—GUTTNER ET AL. v. PACIFIC WHALING Co., 96 Fed. 616**—The masters of two whaling ships, together with natives living on shore, took from an ice-bound vessel, without consent of those in charge, certain provisions. *Held*, that the principle of joint tort feaser does not apply, and that the owners of one of the vessels could only be held liable for the value of such stores taken as were used by his ship, and which it would have been within the scope of the master's employment to secure.

In this case we find the principle of joint tort feasers modified by the rules that govern the relation of principal and servant. If the master of the offending vessel had been sued he could have been held as a joint tort feaser for the entire damage resulting from the acts of all. But if the plaintiff elects to sue the company, it seems that he must forego the advantage that an action against the master would give him. For by the law of torts he can only hold the company liable to the extent of such acts of the master as were in the scope of his authority. *Armory v. Delamiris*, 1 Strang. 505.

**TAXATION—UNIFORMITY—IN RE PAGE**, 58 Pac. Rep. 478 (Kansas).—At the last session of the Kansas Legislature an act was passed providing for the taxation of contracts of insurance made with insurance companies not authorized to do business in the State. *Held*, to be unconstitutional for lack of uniformity.

This enactment is illustrative of the hostility of petty officials toward wealthy corporations who are non-residents. In Kansas it is required that all property shall be taxed at its true value in money. The point was well made by the court that the tax was not uniform, as no account is taken of the solvency of the company, or that the values of other property may fluctuate, or the rate of taxation thereon may change from year to year, while the rate of taxation levied on the property in question remains unchanged. The ununiformity of imposing a tax on a man who insures in a company unauthorized to do business in the State, and the exempting of his neighbor who insures in a licensed company, is obviously unconstitutional. *County of Santa Clara v. Southern Pac. Ry. Co.*, 18 Fed. 385.

**TRADE-NAMES—INJUNCTION—USE OF OWN NAME—ARNHEIM v. ARNHEIM**, 59 N. Y. Sup. 948—"Arnheim the Tailor" dropped the word "Tailor" and adopted the name "Marks Arnheim." Two years later the defendant, whose father-in-law had once used the name "Arnheim the Tailor" in New York, but had abandoned it twelve years before and moved to Chicago, opened a store in New York, using the name "Arnheim the Tailor." She issued receipts, guarantees, and catalogues similar to the plaintiff's and used similar boxes, ordering them from the same people. She exhibited a photograph of the plaintiff as that of the proprietor of her store and arranged her store practically in the same manner as the plaintiff's. *Held*, the plaintiff was entitled to an injunction restraining the defendant from the use of the word "Arnheim" as a trade-mark.

The case shows how absolute has become the authority of the doctrine of "Fair Trade." The defendant was entitled to use her own name as a trade-mark in a business conducted on its own merits and not feeding upon the reputation earned by the sagacity of another. *Chas. S. Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *Devlin v. Devlin*, 69 N. Y. 212; *Gilman v. Hunnewell*, 122 Mass. 139; *Saxlehner v. Apollinaris Company*, 1897 L. R. 1 Ch. 893; *Hires Co. v. Hires*, 182 Pa. St. 346.

**TRUSTS—LIABILITY OF FUND FOR DEBTS OF BENEFICIARY—FIRST NATIONAL BANK OF PLAINFIELD v. MORTIMER**, 60 N. Y. Sup. 47.—A mother devised property in trust, the income therefrom to be applied to the use of her son during his lifetime, and giving said son power to dispose of the property by will. *Held*, that neither the principal or income of such fund could be subjected to the payment of the beneficiary's debts, even for necessities, and also, that as it is impossible to determine how much of such income is a surplus over and above the proper necessities of the beneficiary, such surplus cannot be reached.

Although this decision is based upon statute law and is in harmony with the prior New York decisions (*Graff v. Bennett*, 31 N. Y. 12; *Williams v. Thorn et al.*, 70 N. Y. 270), yet it is of interest inasmuch as it is in opposition to the more generally accepted view. It also points out the extreme liberality extended to such trusts, and the tendency of New York to enlarge the doctrine as existing in other States.



The English rule has been in favor of the right to apply trust property to the satisfaction of the beneficiary's debts, *regardless of the provisions of the settlor*. 1 *Smith Leading Cases* 119; *Dick v. Pitchford*, 1 Der. & Bat. 480. It has been followed in this country by the weight of authority, but subject to the rule that some minor limitations upon the liability of the trust fund should be allowed. *Nichols v. Eaton*, 91 U. S. 725; *Leavitt v. Birne*, 21 Conn. 1; 27 *Am. and Eng. Enc. of Law*, p. 237; *McIlwaine v. Smith*, 92 Am. Dec. 395; *Mandlebaum v. McDonald*, 29 Mich. 781. These limitations, however, have never been of great indulgence to the beneficiary, usually providing for the cessation of his interest upon his insolvency or attempt to subject it to debts.

**WILLS—EXECUTION—SIGNATURE AT THE END—IN RE ANDREWS' WILL**, 60 N. Y. Sup. 141.—A will was drawn on a printed blank folded in the middle so as to constitute four pages connected at the side. A printed introduction and clauses in writing occupied the first page, and on the reverse side of same was contained an appointment of executors, attestation, etc., properly filled in and signed by the testator and witnesses. At the top of this was written "third page." On what would ordinarily be called the third page various clauses disposing of the property were entered. At the top of this page was marked "second page." *Held*, not properly executed and signed under a statute requiring a will to be "signed at the end thereof."

At first impression this seems unnecessarily rigid, especially in view of its being so often done in ordinary correspondence on paper so folded. But the statute was passed to remedy an evil. If a will could be so made on a printed form, why not in like manner, though entirely written. What would then prevent the adding of a page to a will by simply writing "3d page" where it would very naturally have been omitted by the testator, and "2d page" upon the part added. *Hays v. Harden*, 6 Pa. 413; *Wineland's Appeal*, 118 Pa. St. 37; *Glancey v. Glancey*, 17 Ohio, 134; *Sisters of Charity v. Kelly*, 67 N. Y. 410; *Matter of O'Neill*, 91 N. Y. 516.

## BOOK REVIEWS.

**A Treatise on the Law of Trusts and Trustees.** By James Ware Perry. Fifth Edition, by John M. Gould. Little, Brown & Co., Boston, 1899. Sheep, 2 Vols.

The history of the law of trusts from its early beginnings in Fidei Commissa through the English "use" down to the present day, has been characterized by an almost continuous growth and expansion. Courts have extended the application of its general principles to almost every relation in life or course of dealing, and with the commercial progress of the present century and its attendant complexity of business and social relations this extension has been very rapid, and the subject becomes of great importance to the modern lawyer. Mr. Perry's text is too well and favorably known and too generally embodied in judicial opinions to need any commendation or praise, but as the decisions of the ten years which have elapsed since its last edition, have not only extended the field of cases to which the author's general rules are applied, but also have qualified or limited his statement of some of these rules, the present and fifth edition will be welcomed by the legal profession generally. Mr. Gould has left the text of the fourth edition unchanged, but in footnotes and citations has indicated and illustrated the lines of departure. His notes are very full and show the great care with which the edition has been prepared.

**The Law of Presumptive Evidence.** By John D. Lawson, LL.D., Professor of Contract and International Law in the University of the State of Missouri. Second Edition, Revised and Enlarged. Sheep, pp. 674. Central Law Journal Co., St. Louis, 1899.

It has been frequently pointed out in the books that many presumptions commonly called rules of evidence are purely rules of substantive law. But their authority to be treated under the head of evidence rests upon prescription, and we think the distinction will continue to be noticed merely for purposes of illustration.

The author, from an exhaustive examination of cases, has deduced 130 rules which he sets forth as the law governing presumptions. Under each rule, as stated, a set of illustrations is given, taken from decided cases, with a further commentary, showing the conflict of authorities wherever it exists upon any rule.

The scheme, as developed by the author, is an original one of very great merit. The book is, practically, in form, a codification of the law on this subject.

**First Steps in International Law.** By Sir Sherston Baker, Bart. Little, Brown & Co., Boston, 1899. Cloth, pp. 428.

The questions of international law raised during the late war between Spain and the United States concerning the rules of warfare and the position of neutrals, together with the English claim of the right of suzerainty in the Transvaal, and the advent of our own government under the direction of the present administration into the field of colonial expansion, whether we call it according to the dictates of our own conscience, "imperialism," or "manifest destiny," has increased the desire of the intellectual American public to know more concerning the first causes of war, the position of neutrals, the sovereignty of States and the rights of independence and self-preservation.

The present treatise explains fully the great underlying principles of international law in easy language and fascinating manner, and deserves its title because of the clearness of its style for the general reader, and not because of its failure to fully elucidate the questions discussed.

To the student and members of the legal profession, the chapter relating to Prizes Courts, their Jurisdiction and Proceeding, together with the digest in the appendix of some of the more important cases, will be of special interest.

**American Practice Reports.** Vol. 1. Editor-in-Chief, Charles A. Ray. Washington Law Book Co., Washington, D. C., 1899. Pp. 726.

This initial volume of a series of reports is significant of a possible movement in American law practice, which may go even further than did the establishment of the New York code and the many subsequent codes of practice of the other States. The attitude of lawyers to-day is most favorable to a greater simplification of the methods of pleading and court practice, and hence a book which by compilation shows the most recent constructions of settled principles of pleading and practice is certain to suggest a still further elimination of unnecessary provisions. The value of reports of this kind is without question both for the admitted practitioner and the embryonic student of the law. The preface of Editor Ray (whose ability and reputation as Chief Justice of Indiana are acknowledged to be of the highest order) presents interesting data, showing that the average length of lawsuits in this country is from eighteen months to six years, and that no less than 38 per cent. of reversed cases, are reversed not on questions affecting the merits of the case, but on points of procedure. These are remarkable figures and their existence is certainly not evidence of the speedy administration of justice. Justice even from human agencies should come nearer infallibility than this. While the Practice Reports will be of value to both judges and lawyers as a guide and time-saver of tremendous importance, yet it still appears as if its greatest influence would be in inducing a further reformation both of common law and code-practice. This will not be in the immediate future, in all probability, but should occur with the increasing volumes of these reports showing conclusively the many unnecessary and injurious requirements of latter-day procedure. Not the least impressive aspect of these works is the fact that almost without exception, the justices of the courts of last resort of this country have applauded and endorsed the publication, and lent to it their aid and support.

**The Law of Pleading under the Codes of Civil Procedure**, with an introduction briefly explaining the Common Law and Equity Systems of Pleading, and an analytical index, in which is given the code provisions as to Pleading in each of the States which has adopted the reform procedure. Second Edition. By Edwin E. Bryant, Dean of Law Faculty, University of Wisconsin. Little, Brown & Co., 1899. Cloth, pp. 400.

The title of the book as given above fully explains the scope of the work, which is as the author points out in the preface "intended rather as introductory to than a substitute for the more elaborate and exhaustive treatises on the Law of Pleading." Thus to the student intending to practice in a code State who wishes to obtain an elementary knowledge of the radical differences between common law and code pleading on which to build a foundation for the more elaborate study of code procedure, this little work will be of great value, in fact invaluable. This fact, together with the highest testimony of its true worth, has been demonstrated by its adoption as the elementary text book on code procedure by many of the leading Law schools in the country.

**Commentaries on the Law of Private Corporations.** By Seymour D. Thompson, LL.D. Bancroft-Whitney Co., San Francisco, 1899. Seven Volumes. Vol. II.

A supplementary volume containing recent decisions from 1895 to 1899, and also a general index of the whole work.

# YALE LAW JOURNAL

---

Vol. IX.

DECEMBER, 1899.

No. 3

---

## THE ORGANIZATION OF A TERRITORIAL GOVERNMENT FOR HAWAII.

There is every reason why Hawaii should receive without delay a form of Government adapted to its conditions and needs. It is beyond question that at some future time this will be done also with Puerto Rico, Cuba, the Philippines and Guam, but their conditions and needs are widely different from those of Hawaii, and in regard to them there is no express treaty obligation as in the case of Hawaii. In legislating for their government Congress will naturally leave to the President—at any rate for a considerable time—large discretionary powers, with the intention ultimately of establishing some kind of a colonial administration of their affairs which will permit as large a degree of local self-government as they may show that they are fitted for, with opportunities for gradual development on that line. Important committees of each House of Congress are to have charge of the affairs of those island possessions. Those committees will probably have as strong and able a membership as can be furnished by each political party. They will recommend, after careful investigation, the form of colonial government which, while conforming to the requirements of the United States Constitution, shall be in harmony with the policy, foreign and domestic, of the United States. All this will require time and careful work, for it is an untried field.

But there is no occasion for classifying Hawaii as one of our “insular possessions,” or for deferring legislation for organizing its government until its needs and conditions shall be further investigated, and until a definite colonial policy shall be determined upon. In fact, Hawaii is no more a possession in the sense of being a dependency than are the territories of Arizona, New Mexico, Oklahoma and Alaska. American citizens living in those territories,

while knowing the absolute right of Congress to legislate concerning them, do not consider themselves, and are not considered, as colonists or dependents in any sense. Hawaii, unlike the other insular acquisitions, was a sovereign state when it came into the American Union—not, to be sure, as a state, but, as expressed in the treaty negotiated between the two countries and ratified by the Senate of Hawaii, “under the name of the territory of Hawaii.” There are certain rights secured to Hawaii by that treaty or by the joint resolution of Congress known as the Newlands Resolution, which was substituted for the treaty, which cannot be ignored without violating moral obligations which are all the more sacred and binding in the form of conscience, because they can no longer be enforced by the state which has voluntarily ceded its sovereignty to the United States. The very authority for the joint resolution is contained in its preamble, which is thus worded:

“WHEREAS, The Government of the Republic of Hawaii, having in due form signified its consent, in the manner provided by its Constitution, to cede absolutely and without reserve to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining:”

Thereupon it was:

“Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That said cession is accepted, ratified and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.”

The “consent” of the Republic of Hawaii to cede its sovereignty to the United States, referred to in the preamble above mentioned, is expressed in the treaty, and in no other way, as follows:

“The Republic of Hawaii and the United States of America, in view of the natural dependence of the Hawaiian Islands upon the United States, of their geographical proximity thereto, of the preponderant share acquired by the United States and its citizens in the industries and trade of said Islands, and of the expressed desire of the Government of the Republic of Hawaii that those Islands should be incorporated into the United States as an integral part thereof, and under its sovereignty, have determined to accomplish by treaty an object so important to their mutual and permanent welfare.”

It must be inferred that the resolution was intended to accomplish the objects so defined, and to express the stipulations for the cession which were consented to by Hawaii in the treaty, which are as follows:

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands, but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, that all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

"Until Congress shall provide for the government of such Islands all the civil, judicial and military powers exercised by the officers of the existing government in said Islands, shall be vested in such person or persons, and shall be exercised in such manner as the President of the United States shall direct, and the President shall have power to remove said officers and fill the vacancies so occasioned.

"The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations.

"The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

"Until legislation shall be enacted extending the United States custom laws and regulations to the Hawaiian Islands, the existing customs relations of the Hawaiian Islands with the United States and other countries shall remain unchanged.

"The public debt of the Republic of Hawaii lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the Government of the United States, but the liability of the United States in this regard shall in no case exceed four million dollars.

"So long, however, as the existing government and the present commercial relations of the Hawaiian Islands are continued, as hereinbefore provided, said government shall continue to pay the interest on said debt.

"There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands.

"The President shall appoint five Commissioners, at least two of whom shall be residents of the Hawaiian Islands, who shall, as

soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian Islands as they shall deem necessary or proper."

Now whatever disposition Congress may make of the public lands in the Philippines or in any other places,—and it is understood that questions of great difficulty will present themselves on this subject—the revenue from and proceeds of the public lands of Hawaii must by the treaty and resolution be used solely for the benefit of Hawaii for educational and other public purposes, excepting that which shall be used for national purposes.

The public debt of Hawaii, not to exceed \$4,000,000, is assumed by the United States. Chinese immigration into Hawaii is restricted, as it is elsewhere in the United States. It is thought by some persons that the clause in the resolution retaining the existing customs regulations of the Hawaiian Islands with the United States and other countries, "until Congress shall extend to Hawaii the benefit of the United States customs laws," implies that Congress may, if it choose, never give to Hawaii the benefit of the United States customs laws, and "uniform taxes." And those who maintain this view contend that those customs laws ought not to be extended to Hawaii, and thereby, as they think, bring "cheap labor products" into competition with American labor.

Undoubtedly both political parties will endeavor to shape legislation for the insular possessions with the professed object of benefiting and not injuring American labor. Here, probably, will be one of the main points of controversy concerning legislation for Hawaii. If the assisted immigration laws shall be applied to Hawaii,—and it is difficult to see how Hawaii can be excepted from their application—the result will be that cheap labor will be obtainable there no further than it is in California, or Louisiana, or any state in the Union. Since the date of the treaty, June 16, 1897, and for a considerable time prior to that date, Chinese immigration has been rigidly restricted in Hawaii, and the statistics show that the number of Chinese there to-day is less than two years ago. Japanese have continued to be introduced in Hawaii, to meet the industrial needs of the large number of new sugar and coffee plantations established since annexation. An attempt was made by the Hawaiian Government over a year ago to exclude Japanese by deporting a large number for failure to comply with the restricted immigration laws made by the Republic of Hawaii. This proved to be a costly thing for Hawaii. The Japanese Government finally compromised for the sum of \$75,000, a claim against the Hawaiian Government for this deportation. Hawaii can to a certain extent

restrict, but is powerless to prevent Japanese from going to that country whether as laborers, merchants, or "students;" but then there is nothing to prevent Japanese from entering the United States without restriction and whenever they like. If they shall cease to go to Hawaii, it will not be because of assisted immigration laws enforced there. They will continue to go voluntarily because they like the Hawaiian climate and conditions. The Japanese Government encourages them to go, expecting them to return as they usually do after a term of years, to enrich Japan with their newly acquired experiences. Their wages will go up considerably when the United States immigration laws shall be in force in Hawaii, but they will continue to do a large portion of the field labor required in the cultivation of sugar cane and coffee.

Still another subject of discussion in respect of Hawaii, as well as the insular possessions generally, will be whether to extend to them the laws of the United States relating to commerce and merchant seamen in regard to vessels built and owned by citizens in those places as entitled to American legislation and to enact that the trade between those Islands and any portion of the main land shall be regarded as coasting trade and regulated by the United States laws requiring coast trade to be carried on only by American vessels. Do the conditions exist in respect of those countries far removed from the coast line of the United States, which called into being the coasting trade laws? Can a great trade with the Orient and between those Islands and the main land be carried on with advantage at the present time, or be so easily developed by confining it to American bottoms? These are considerations which all public spirited and statesmenslike men in the National Capital will have to ask each other and themselves, and answer as best they may.

But of all the countries which are here mentioned, Hawaii is the only one which is now entitled to any high degree of local self-government, and which is capable of immediate assimilation with American institutions. This can easily be seen by looking over the report made by the Hawaiian Commission, of which Senator Cullom is Chairman, and which included Senator Morgan and Representative Hitt on the part of the United States, and President Dole and Justice Frear on the part of Hawaii. This Commission, which was appointed in accordance with the stipulations of the treaty of annexation, prepared a bill which was introduced in the Senate last December by Senator Cullom, and in the House by Representative Hitt, entitled: "A bill to provide a government for the territory of Hawaii." The same bill in substance is again introduced at the present session and referred as before to the Committee on Foreign



Relations in the Senate, and the Committee on Territories in the House.

The report of the Commissioners is a voluminous document, showing in considerable detail, and with great thoroughness, the conditions and institutions of the Hawaiian community. In considering what kind of government is fitted for the Hawaiian group, a knowledge of its history, its present status, and its reasonable needs, is requisite, and examination of that report will satisfy any candid mind that the provisions of the proposed bill are appropriate and wise.

The elaborate public school system of Hawaii is not inferior in theory or practice, or in the personnel of its administrators, to that of any state of the American Union. Hawaiian law has for its basis the common law of England, with statutes which simplify the practice, codify most of the rules of evidence, define all criminal offenses, and provide for a large portion of the practice of criminal law. Hawaiian admiralty law is substantially that of the United States. Equity jurisdiction and practice are based on legislation almost literally copied from that of the Commonwealth of Massachusetts, and the same is true of probate practice. The lawyer's brief for a Hawaiian court is the same kind of a brief which would be presented to the courts of any of the older states of the Union, which are not under code law.

Public highways, bridges, harbors and buildings, are cared for in a manner which would do credit to any American state.

The legislative, executive and judicial departments of the government work independently of each other, except in the power exercised by the Supreme Court of determining the constitutionality of legislative enactments. The practice has been more common in Hawaii than elsewhere of obtaining for the executive and legislative departments the opinions of the justices of the Supreme Court on questions of law upon proposed, as well as enacted, statutes.

The cosmopolitan and refined social life of Hawaii is the delight of visitors and tourists. The aboriginal Hawaiian race, while not as yet well qualified for the work of making constitutions, or enacting fundamental law, are otherwise well-fitted for the duties of American citizenship. In Senator Cullom's bill it is provided "that all persons who were citizens of the Republic of Hawaii on August 12, 1898, are to be citizens of the United States." This leaves out nearly all of the Asiatics, who form a large part of the population. The bill further provides for the continuance of the laws of Hawaii not inconsistent with the Constitution or laws of the United States; and abolishes those Hawaiian offices which were used only for the

Republic of Hawaii. Contested elections are decided by the Territorial Supreme Court. The Senate is to be composed of fifteen members, with a tenure of office of four years, and the House of Representatives of thirty members, elected every second year. The bill preserves many useful features of the constitution of the Republic of Hawaii; as, for instance, it allows the governor to "veto any specific item or items in any bill which appropriates money for specific purposes."

Hawaii at present has no municipal governments. The proposed bill allows the legislature to "create counties, and town and city municipalities within the territory of Hawaii, and provide for the government thereof." Voters for senators are required to own property of the value of not less than one thousand dollars, or to have received an income of not less than six hundred dollars during the year preceding registration. The bill keeps in force in the main the laws of Hawaii relating to agriculture and forestry, and also concerning the public lands, requiring all the proceeds of such lands to be applied by the laws of the government of the territory of Hawaii for the benefit of the inhabitants of that territory. The judges of the territory are to be appointed; those of the Supreme Court with life tenure; the judges of the Circuit Courts for six years; and magistrates for two years, in conformity with the laws of Hawaii heretofore in force, relative to the judicial department, civil and criminal procedure which in substance are to be reenacted for the territory. The importance of avoiding an elected judiciary in Hawaii is evident. It is to be hoped that this feature of the proposed bill will be strictly adhered to, whatever action shall be taken about the life tenure of judges.

The bill in all its features will bear the closest scrutiny, and will, I hope, be passed without any radical amendments with as little delay as possible.

It is unfortunate that the Fifty-fifth Congress did not provide legislation for Hawaii other than in the very scant provision made in the Newlands Resolution. Nothing but the exercise of good judgment and tact on the part of Hawaiian officials and courts, as well as of the Administration in Washington, has prevented serious difficulties and loss, for practically there has been something very like an interregnum in Hawaiian affairs.

Whatever may come, or may not come, from expansion in other directions, I am confident that no better or truer citizens of the United States will be found than in beautiful Hawaii.

ALFRED S. HARTWELL.

VALIDITY OF A DEFENSE THAT THE DEFENDANT WAS NOT SATISFIED, IN CASES OF CONTRACT WHEREIN IT WAS SPECIFIED THAT THE STIPULATIONS OF THE OTHER PARTY SHOULD BE PERFORMED TO HIS SATISFACTION.

When two parties have entered into a contract, performance by the one is often a necessary preliminary to the maintenance of an action against the other for non-performance. This performance, moreover, must be in accordance with the terms of the contract as construed by the court. For it is the province of the court to determine, by construction, the meaning of an express contract, and, in doing this, the guiding principle is to effectuate the intention of the parties. Express contracts are given a construction which will bring them as near the actual meaning of the parties as the language used permits.

Interesting questions of construction arise when one of the parties to the contractual obligation has undertaken that performance on his part shall be to the satisfaction of the other party. These questions are usually presented when suit is brought upon such a contract, and the party to whom satisfaction was guaranteed sets up as a defense that he was not satisfied. It then devolves upon the court to decide upon the validity of this defense, and this is determined by finding the meaning of provision guaranteeing the defendant's satisfaction, or by construing the contract. Three constructions have been suggested. By the *first*, the defendant is made the sole judge as to whether the stipulations of the other party have been performed to his satisfaction, and the honesty of his decision cannot be questioned. By the *second*, the defendant is the sole judge, but his decision must be made honestly and in good faith. The *third* imposes upon the defendant a duty to act reasonably. Under this the contract is held to be performed to the defendant's satisfaction if the performance would be satisfactory to a reasonable man.

The first of these constructions, although sustained by numerous dicta, seems to lack the support of judicial *decision*.

On reviewing the authorities, it is found to be without the *direct* sanction of a single case. The main contention usually is whether to apply the second or the third construction. By some courts the second construction is always applied, and the defendant's honest judgment is held to determine conclusively the satisfactoriness of the plaintiff's performance. Other courts apply this construction only to contracts made "to gratify taste, serve personal convenience or satisfy individual preferences."<sup>1</sup> The third construction, requiring the defendant to act reasonably, is applied by these courts to all other contracts. From what has been said, it will be readily seen that, in all jurisdictions, contracts containing the personal element above referred to, receive the same construction. It may be well, therefore, to review the cases in which contracts of this nature are construed, before turning to those in which a different rule of construction is applied in different jurisdictions. This review of the authorities is to be, for the most part, illustrative, and the citations are intended to be typical rather than exhaustive.

The case of *Zaleski v. Clark*<sup>2</sup> is a good illustration of the construction given a contract falling within the rule applicable to contracts made "to gratify taste, serve personal convenience or satisfy individual preferences." In this case the plaintiff, a sculptor, brought an action for the price of a bust which he had made of the defendant's deceased husband. The bust had been made under a contract which expressly provided that the defendant need not pay the purchase price unless satisfied with it. The defendant was not satisfied because it had not the expression of the deceased during his life, and this was held to be a good defense to the maintenance of the action, although the fault was not the result of imperfect workmanship, but because of the nature of a bust, as a dead white model and necessarily destitute of the expression of color and life. The fact that the defendant ought to have been satisfied, it was held, was immaterial.

*Brown v. Foster*<sup>3</sup> is another case of this class. There the plaintiff, a tailor, had agreed to make the defendant a suit of clothes to his satisfaction. The defendant was not satisfied with the clothes and returned them, refusing even to allow the plaintiff to make alterations. In an action for the price it was

---

<sup>1</sup> Danforth, J., *Boiler Co. v. Garden et al.*, 101 N. Y. 390.

<sup>2</sup> 44 Conn. 218.

<sup>3</sup> 113 Mass. 136.

proved by other tailors that the clothes were well made, except for a slight defect which could be easily remedied. Nevertheless, it was held that the action would not lie. "Although," said Devens, J., "the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered." So also where the plaintiff had undertaken to make an enlarged picture of the defendant's deceased daughter,<sup>4</sup> and in another case, where the contract was to make a crayon portrait of the defendant and his wife,<sup>5</sup> the same conclusion was reached. In both cases the plaintiff had undertaken that the work should be satisfactory to the defendant, and in both cases the dissatisfaction of the defendant, whether reasonable or not, was held to be a valid defense.

These views are also entertained in England, where it was decided by Cresswell, J., Williams, J., and Willis, J., concurring, that a contract to build a pony phaeton to meet the defendant's approval, "not only on the score of workmanship, but also that of convenience and taste," gave the defendant a right to reject it, provided he acted *bôna fide*.<sup>6</sup>

Contracts of service containing a stipulation for satisfaction also seem to belong to this category, whenever the services to be rendered are of a personal nature. And so in New York, where the distinction is made between contracts involving elements of personal taste and convenience and those which do not, it was held that an agent employed for a year, provided he "could fill the place satisfactorily," might be discharged by the employer whenever dissatisfied.<sup>7</sup> The view that this decision, which is followed in a later case,<sup>8</sup> was based upon the theory that the contract involved was within the rule applicable to contracts made to serve personal taste or convenience, is supported by the opinion of Danforth, J., in *Boiler Co. v. Garden*.<sup>9</sup> Numerous other cases have included the construction of service contracts of this nature and, wherever the services have been of a personal nature, the conclusion has been the same.<sup>10</sup>

<sup>4</sup> *Gibson v. Cranage*, 39 Mich. 49.

<sup>5</sup> *Moore v. Goodwin*, 43 Hun. 534. See also *Hoffman v. Galaher*, 6 Daly 42. (Friend's satisfaction.)

<sup>6</sup> *Andrews v. Belfield*, 2 C. B. (N. S.) 779.

<sup>7</sup> *Tyler v. Ames*, 6 Lans. (N. Y.) 280.

<sup>8</sup> *Spring v. Clock Co.*, 24 Hun 175.

<sup>9</sup> 101 N. Y. 387, 390.

<sup>10</sup> *Harder v. Board of Commrs.*, 97 Ind. 455; *Durgin v. Baker*, 32 Me. 273.

But in those jurisdictions which have not a uniform rule of construction it is essential that the services to be rendered are of a personal nature. Otherwise the contract would receive a construction requiring the employer to act as a reasonable man in dismissing the employee. This is well illustrated by two recent New York cases, the facts of which are almost identical. In both of these cases dramatic artists were employed under contracts which reserved to the employer the right to dismiss them, if at any time he should be satisfied, in good faith, that they were incompetent, and in each case it was held that this gave the employer no arbitrary right of dismissal.<sup>11</sup> The opinions in these cases are somewhat involved, because of certain limiting terms in the contracts to be construed, but it seems to have been clearly the intention of the learned judges to keep the construction of contracts for this kind of services without the rule applicable to contracts involving elements of personal taste and convenience. This view, moreover, finds support in the opinion of Andrews, Ch. J., in one of the cases under consideration.<sup>12</sup> So also a contract to alter certain boilers providing for payment when the employer is "satisfied that the boilers as changed are a success," was expressly held not to be within the rule of construction applied when the object of the contract is to "gratify taste, serve personal convenience or satisfy individual preference."<sup>13</sup>

The same principles control service contracts for a definite period, which contain a stipulation that the employee may leave whenever dissatisfied. In these cases, provided the services are of a personal nature, the employee may quit the employment whenever he is dissatisfied, and recover for services actually rendered, although his departure was before the expiration of his term.<sup>14</sup> The fact that the employee has no good reason for his dissatisfaction is immaterial.<sup>15</sup>

As already indicated, contracts expressly stipulating for satisfaction, but which are not made to gratify taste, serve personal convenience or satisfy individual preference, do not receive the same construction in all jurisdictions. It is in regard to contracts of this nature that the authorities are in conflict, and the contention, above referred to, whether to apply

<sup>11</sup> *Smith v. Robson*, 148 N. Y. 252; *Grinnell v. Kiralfy*, 55 Hun 422.

<sup>12</sup> *Smith v. Robson*, 148 N. Y. 252, 255-6.

<sup>13</sup> *Boiler Co. v. Garden*, 101 N. Y. 387, 390.

<sup>14</sup> *Rossiter v. Cooper*, 23 Vt. 522; *Provost v. Harwood*, 29 Vt. 219; *Sloan v. Hayden*, 110 Mass. 141; *Moffatt v. Dickson*, 13 Com. B. 543.

<sup>15</sup> *Rossiter v. Cooper*, 23 Vt. 522, 524-5.

the construction requiring the defendant to act reasonably or that allowing the defendant's judgment, honestly exercised, to determine the satisfactoriness of the plaintiff's performance, is most marked.

The New York courts are the leading exponents of the construction of this class of contracts, by which the defendant is required to act as a reasonable man. This view seems to have been instituted by Kent, Ch. J., in *Follard v. Wallace*.<sup>16</sup> In that case the defendant agreed to pay the plaintiff a certain sum if satisfied that the title to a piece of land, conveyed to him by the plaintiff, was undisputed. In a suit upon this contract it was held that dissatisfaction, without some good reason therefor, was no defense; "the law," said the court, "will determine for the defendant when he ought to be satisfied." This decision was followed in a later case where specific performance of a similar contract was granted.<sup>17</sup> In two very recent cases the same conclusion has been reached and contracts to convey "satisfactory" titles have received a construction requiring the title only to be "marketable."<sup>18</sup> It is true that in one case in this jurisdiction it was held that an action for the price of a steamboat sold under a contract containing a stipulation for satisfaction, would not lie unless the vendee was in fact satisfied, and whether or not the vendee ought in reason to have been satisfied was immaterial.<sup>19</sup> This conclusion, however, which has only the sanction of a Supreme Court decision which was not unanimous, is so inharmonious with more recent cases that it may be regarded as virtually overruled. The case of *Doll v. Noble*<sup>20</sup> more correctly illustrates the present law of New York. In that case an action was brought to recover money due upon a contract for polishing and staining the woodwork of two houses. It had been provided in the contract that the work should be done "to the entire satisfaction" of the defendant, but this, it was held, gave the defendant no right to defeat a recovery by unreasonably saying that he was not satisfied. The case of *Boiler Co. v. Garden*<sup>21</sup> and the two cases construing contracts for services of theatrical performers,<sup>22</sup> which

<sup>16</sup> 2 Johns, N. Y. 397.

<sup>17</sup> *Rigney v. Coles*, 6 Bosw. (N. Y.) 479.

<sup>18</sup> *Jay v. Wilson*, 91 Hun 391; *Moot v. Business Men's Investment Ass'n*, 157 N. Y. 201.

<sup>19</sup> *Gray v. R. R. Co.*, 11 Hun 70.

<sup>20</sup> 116 N. Y. 230.

<sup>21</sup> 101 N. Y. 387.

<sup>22</sup> *Smith v. Robson*, 148 N. Y. 252; *Grinnell v. Kiralfy*, 55 Hun 422.

have been referred to in another connection, are also good illustrations of the principles now under consideration.

Illinois has adopted a similar construction of contracts of this nature, and in a recent case in that State, a contract to grade some land to the satisfaction of the defendant was held to be performed when the grading was done in a manner satisfactory to the mind of a reasonable man." Other views were advanced in an early case," but these must now be considered repudiated.

In most jurisdictions, however, the rule of construction is uniform. Contracts of this kind receive the same construction that is given contracts involving elements of personal taste and convenience, and the defendant's honest judgment is held to determine whether or not the plaintiff's performance is satisfactory to him. This construction was applied in Massachusetts in the case of *McCarren v. McNulty*," where the plaintiff had undertaken to build a book-case for a society, and to finish it in a manner satisfactory to the president of the society. It was decided in this case that, unless the book-case was satisfactory to the president of the society, there could be no recovery for labor and materials; for, from the consequences of the plaintiff's own bargain, the law would afford him no relief. So where a machine for generating gas was sold under a contract providing for the repayment of the purchase price in case the vendee was not satisfied, it was held that, if the vendee was not satisfied, an action by him to recover the purchase price would lie, and it was immaterial that the machine was an excellent one." In Vermont, also, the same construction was applied in *McClure v. Briggs*." In that case the plaintiff's agent set up an organ for the defendant, under an agreement giving to the defendant the right to reject it if not satisfied with it. The defendant honestly thought he was dissatisfied, although without cause, and this, it was held, was a good defense to an action for the price. If the dissatisfaction was real and not feigned, honest and not pretended, the plaintiffs had not fulfilled their contract. The same conclusion was also reached in Vermont, in two earlier cases, one involving the construction of a contract for the sale of a set of milk pans," the other the construction of

---

"Keeler v. Clifford, 165 Ill. 544.

"Goodrich v. Van Nortwick, 43 Ill. 445.

"7 Gray 139.

"Aiken v. Hyde, 99 Mass. 183.

"58 Vt. 82.

"Daggett v. Johnson, 49 Vt. 345.



a contract for the sale of a sugar evaporator," and both containing a stipulation for satisfaction.

Several recent cases have settled the question in Pennsylvania. In one of these an action was brought to recover the purchase price of a reaper and binder, sold on condition that it should prove satisfactory to the defendant. A charge to the jury that, if the defendant had reasonable cause to be displeased with the machine he had the right to reject it, was held to be erroneous; and it was decided that the defendant had the right to reject it if his objections were made in good faith, and it was immaterial how unreasonable or ill-founded they might appear to others." This conclusion has been firmly maintained in three other cases in the same jurisdiction." Similar contracts for the sale of machines have several times come before the courts of Michigan, and in every case have received a construction permitting the defendant, provided he acted in good faith, to be the sole judge as to whether or not the stipulations of the plaintiff had been performed to his satisfaction." In one of these cases the machine was accidentally burned before the defendant had concluded that it satisfied him. It was, therefore, decided that the loss should fall upon the plaintiff." So also in Wisconsin, in the case of a similar contract for the sale of exhaust fans to be used in the defendant's blacksmith shops, a demurrer to an answer, setting up that the defendant was honestly and in good faith dissatisfied with the fans, was held to have been properly overruled."

In Virginia it was decided that an action would not lie to compel specific performance of a contract to purchase land, the title to which was to be satisfactory to the vendee, unless the vendee was in fact satisfied with the title; and if the vendee was in good faith not satisfied, it made no difference that the title was really good." Two cases in Maryland have decided that when a railroad company has contracted to purchase supplies, provided they are satisfactory to certain agents of the

---

<sup>99</sup> *Manufacturing Co. v. Brush*, 43 Vt. 528.

<sup>100</sup> *Seeley v. Welles*, 120 Pa. 69.

<sup>101</sup> *Boiler Works v. Schmader*, 155 Pa. 394; *Howard v. Smedley*, 140 Pa. 81; *Singerley v. Thayer*, 108 Pa. 291.

<sup>102</sup> *Platt v. Broderick*, 38 N. W. R. 579 (Mich); *Plano Manufacturing Co. v. Ellis*, 35 N. W. R. 841 (Mich.); *Pierce v. Cooley*, 23 N. W. R. 310 (Mich.); *Machine Co. v. Smith*, 50 Mich. 565.

<sup>103</sup> *Pierce v. Cooley* (supra).

<sup>104</sup> *Exhaust Ventilator Co. v. Chicago, M. & St. P. Ry. Co.*, 66 Wis. 218.

<sup>105</sup> *Averett v. Lipscombe*, 76 Va. 404.

company, the agents designated may, in the exercise of fair and honest judgment, reject the supplies, and the company will not then be liable for the purchase price." These conclusions have also the support of a decision in Minnesota," and of dicta in Indiana" and California."

The Federal Courts have given their support to this construction in two well considered cases. In one of these it was held that a fire engine, sold with a warranty that it would be satisfactory to a committee representing the defendant, might be rejected by the defendant if the committee were not satisfied with it." In the other, after a review of the authorities, a similar decision was made." The courts of England have taken the same view, although there are dicta to the contrary." A few decisions, which at first sight seem conflicting, can probably be distinguished." The case of *Grafton v. Eastern Counties Railway* " may be considered a correct illustration of the English law on this subject. In that case the plaintiff had contracted to furnish the defendant with a quantity of coke satisfactory to the defendant's inspecting officer. It was held that a declaration, which failed to allege that the officer was satisfied, was demurrable. In another case an action was brought for work, labor and materials. The defendant's plea alleged a contract which they might terminate if not satisfied. A replication by the plaintiff that the defendants ought reasonably to have been satisfied was held, on demurrer, to be no answer to the plea." Several earlier decisions are also to the same effect."

It has been seen that but three constructions of contracts of this nature have been suggested, and that the first of these, by which the defendant's judgment, honestly or dishonestly exercised, is held to determine whether or not he is satisfied with the plaintiff's performance, is without the support of a single

---

<sup>36</sup> *B. & O. R. R. Co. v. Brydon*, 65 Md. 198; *Lynn v. B. & O. R. R. Co.*, 60 Md. 404.

<sup>37</sup> *Machine Co. v. Chesrown*, 33 Minn. 32.

<sup>38</sup> *Barlow v. Thompson*, 46 Ind. 384, 388.

<sup>39</sup> *Hallidie v. Sutter St. R. R. Co.*, 63 Cal. 575, 576.

<sup>40</sup> *Silsby Manufacturing Co. v. Town of Chico*, 24 Fed. R. 893.

<sup>41</sup> *Pringing Press Co. v. Thorp*, 36 Fed. R. 414.

<sup>42</sup> *Brannstein v. Insurance Co.*, 1 B. & S. 782, 795.

<sup>43</sup> *Dalhman v. King*, 4 Bing. N.C. 105; *Brannstein v. Insurance Co.* (supra).

<sup>44</sup> 8 Exch. 699.

<sup>45</sup> *Stadhart v. Lee*, 3 B. & S. 364.

<sup>46</sup> *Ellis v. Mortimer*, 1 Bos. & Pul. (N. S.) 257.

*Taylor v. Brewer*, 1 M. & S. 290.

*Clarke v. Watson*, 18 Com. B. (N. S.) 278.

decision. This construction, moreover, cannot be maintained on principle. In these cases the intention of the parties, the main consideration in construing contracts, is that the defendant shall in fact be satisfied; and the defendant's judgment in no way determines that he is not satisfied, unless that judgment is honestly rendered.

It has been seen that in most jurisdictions, the second construction, which is the same as the first, except that the defendant's judgment must be honest, is applied indiscriminately to all kinds of contracts in which a performance satisfactory to the defendant has been undertaken. It has been seen that in New York, and probably in Illinois, this construction is applied only to contracts made to gratify taste, serve personal convenience or satisfy individual preference. That in all other cases, in these jurisdictions, performance on the part of the plaintiff is held to be to the satisfaction of the defendant if it would be satisfactory to a reasonable man. This modification seems to have resulted from the harshness, which is more apparent than real, of the rule maintained by the weight of authority. It was probably not applied to contracts made to serve personal taste and convenience, because, in contracts of that nature, the intention to satisfy the defendant *personally* is more conspicuous. Moreover, in these cases the modified rule would be difficult of application, for, in that kind of contracts, reasonable men might differ widely as to what was a satisfactory performance. An objection to the New York view is that it renders the law on the subject somewhat uncertain. It is difficult to determine just what contracts will be held to fall within the rule applied to contracts made to serve personal taste and convenience. Numerous instances might be suggested in which this question would be exceedingly puzzling.

The view maintained by the weight of authority seems, on the whole, more satisfactory. It has, first, the advantage of uniformity. The necessity of nice distinctions is obviated and the law in this connection rendered more certain. Secondly, it is clearly consistent with the principles usually applied in construing contracts. No other intention can be found in the wording of these contracts than that the defendant himself was to be satisfied, and in determining this the defendant's honest judgment is the only available criterion. That others, the jury or the court are satisfied with the plaintiff's performance is immaterial. The language of these contracts in no way indicates that it was the intention of the parties to consider the undertaking to satisfy the defendant performed, until the

defendant was in fact satisfied. The fact that the defendant was an unreasonable man should not alter the terms of the obligation. It is true that the application of this construction to some cases seems severe to the plaintiff. But, then, the plaintiff need not have made any such contract. He voluntarily entered into the agreement and it is difficult to see why the law should afford him any relief. This construction, moreover, is certainly no more harsh than the general rule of law that impossibility will not excuse the failure to perform contractual obligations."

This view may also be supported by analogy in the construction which is applied to chattel mortgages containing what is known as the "security" or "danger" clause. By this clause it is usually provided that the mortgagee may take possession of the mortgaged property "when he may deem himself insecure." This is construed to give the mortgagee the right of possession when, in good faith, he thinks himself insecure. His opinion must be genuine, but it need not be reasonable. The mortgagee's decision that he is insecure can only be attacked on the ground that it was made fraudulently."

Of course, however, very clear language should be required to support this construction. In doubtful cases a just hesitation should be felt before deciding that payment is left to the will, or even to the idiosyncrasies of the defendant."

---

<sup>41</sup> *Paradine v. Jane*, Aleyn, 26; *Harmony v. Bingham*, 12 N. Y. 99.

<sup>42</sup> *Thomas on Chattel Mortgages and Conditional Sales*, Sec. 29, cases cited.

<sup>43</sup> *Hawkins v. Graham*, 149 Mass., 284.

GROSVENOR NICHOLAS.

## THE THIRD VIEW OF THE STATUS OF OUR NEW POSSESSIONS.

For the first time since the discussion as to the legal and constitutional status of Puerto Rico and the Philippines arose, a thoroughly intelligent and forceful argument has been advanced in favor of the "imperialist" contention. That argument is found in Mr. Abbott Lawrence Lowell's article on "The Status of Our New Possessions—A Third View," published in the November number of the *Harvard Law Review*.<sup>1</sup>

Mr. Lowell's view, briefly stated, is as follows: Neither the proposition that the power of Congress over the territories of the United States is absolutely unqualified by any constitutional restriction, nor the opposing doctrine that the limitations imposed by the United States Constitution upon the federal government apply wherever the jurisdiction of that government extends, harmonizes with commonly received opinion or accords with all the United States Court decisions, while the latter proposition is open to the further objection that it makes well nigh impossible the government of our new possessions properly acquired, and so may be called irrational. A third view is therefore necessitated, namely: "The theory, therefore, which best interprets the Constitution in the light of history, and which accords most completely with the authorities, would seem to be that territory may be so annexed as to make it a part of the United States, and that if so, all the general restrictions in the Constitution apply to it, save those on the organization of the judiciary; but that possessions may also be so acquired as not to form part of the United States, and in that case constitutional limitations, such as those requiring uniformity of taxation and trial by jury, do not apply."<sup>2</sup> It is all a matter of treaty provision. In the case of Louisiana, Florida, California, the territory included in the Gadsen Purchase and Alaska, there were express treaty provisions giving to the inhabitants of the ceded territory, with the exception in the case of Alaska of the uncivilized native tribes, "the enjoyment of all the rights, advantages and immunities of the United States," and as respects all the territory of

---

<sup>1</sup> 13 Harv. Law Rev. 155.

<sup>2</sup> 13 Harv. Law Rev. 176.

the United States ceded by treaties containing such express provisions the limitations imposed by the United States Constitution on the federal government have been held by "the overwhelming weight of judicial authority" to apply, and of course do apply. "But the recent treaty with Spain makes no such provision. It merely cedes Puerto Rico and the Philippines to this country without any stipulation in regard to the relation in which the islands or their inhabitants shall stand towards the United States. In fact, the ninth article—after providing that Spanish subjects, natives of the Peninsula and residing in the ceded territory, may preserve their allegiance to the Crown of Spain, or renounce it—substitutes for the clause in the earlier treaties, that in the latter case they shall acquire, or be admitted to the rights of citizens of the United States, the provision that they shall be held 'to have adopted the nationality of the territory in which they may reside;' and adds, 'The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.' Hence it is clear that if the government can acquire possessions without making them a part of the United States, it has done so in this case."<sup>3</sup> It can so acquire possessions. The authority showing that this is so, and that the limitations of the Federal Constitution do not apply in Puerto Rico and the Philippines, is meagre, but is found in a *dictum* of Mr. Justice Johnson in *The American, etc., Ins. Co.'s v. 356 Bales of Cotton*, 1 Peters 517 note, and in the cases of *Fleming v. Page*, 9 How. 603, and *In Re Ross* 140 U. S. 453.

Mr. Lowell's doctrine outlined above has certain unsatisfactory features. The most striking is that he is loath to extend it as far as logically he ought to do. "It may well be," he remarks at the close of his article, "that some (constitutional) provisions have a universal bearing because they are in form restrictions upon the power of Congress rather than reservations of rights. Such are the provisions that no bill of attainder or ex post facto law shall be passed, that no title of nobility shall be granted, and that a regular statement and account of all public moneys shall be published from time to time. These rules stand upon a different footing from the rights guaranteed to the citizens, many of which are inapplicable except among a people whose social and political evolution has been consonant with our own."<sup>4</sup> Such a position is logically indefensible. Every reservation or guarantee of rights in the Federal Constitution is in fact, if not in form, a restriction upon the power of Congress,

---

<sup>3</sup> 13 Harv. Law Rev. 171, 172.

<sup>4</sup> 13 Harv. Law Rev. 176.

and in constitutional interpretation it is fact, not form that controls. When it is sought to relieve the legislation of Congress, applicable to any territory from constitutional restrictions, the only possible theory on which to do it is that the Constitution does not apply at all to such territory, unless Congress decrees that it shall. *Ex post facto* laws are no more forbidden by the Constitution than is lack of uniformity in taxation, and the right to the publication of regular statements and accounts of public moneys is no more guaranteed than is the right to trial by jury. Congress either has unlimited scope in dealing with the personal and property rights of Puerto Ricans and Filipinos in their respective islands, or its power is restricted by all the limitations provided in the Federal Constitution which are in terms of general application.

Mr. Lowell's argument against "the broader construction which extends the provisions of the Constitution over our new dependencies" is that it contradicts the authorities he cites, and besides "is irrational, because it extends the restrictions of the Constitution to conditions where they cannot be applied without rendering the government of our new dependencies well nigh impossible." "Surely," he adds, "no provision ought to be given an interpretation which leads to an irrational result, if the language will bear equally well a different construction."<sup>8</sup> In other words, he impliedly asserts that any construction of the Federal Constitution which makes that instrument forbid us to do what it may be expedient for us to do, or even what we want to do, is irrational and to be avoided. It is elementary, however, that the only reason for having prohibitions in the Federal Constitution is to prevent Congress from doing many things which might be expedient, or which Congress might and probably would want to do, and that in determining the constitutionality of any legislation questions of expediency or desirability are wholly irrelevant, except in the rare case where the uncertainty of the language used in the Constitution creates a genuine doubt as to its real meaning and application. The only thing for Congress or the court to do in a given case is to ascertain the true meaning and application of the Constitution and then see that full effect is given to all its provisions, whether they be positive or negative. Any other course of procedure would be wholly irrational in the real sense of the word.

Another unsatisfactory feature of Mr. Lowell's argument is that the authorities which he cites to support his contention are not only, as he admits, "meagre;" they are not even at all in point.

---

<sup>8</sup> 13 Harv. Law Rev. 157.

The opinion of Mr. Justice Johnson in *Amer., etc., Ins. Co.'s v. Canter* or 356 Bales of Cotton, 1 Peters 517 n., is pure *obiter dicta* to begin with, for on appeal from his decision in that case the United States Supreme Court expressly decided that the treaty with Spain, by its very terms, admitted the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States, and that, therefore, "it is unnecessary to inquire whether this is not their condition independent of stipulation."<sup>6</sup> Moreover, Mr. Justice Johnson announced a doctrine which has since been repudiated by the United States Supreme Court, and which Mr. Lowell himself disowns. The original thirteen States, the Northwest territory, and future States to be admitted, are not the only ones entitled to the guarantees of the Federal Constitution, i. e., are not, as Mr. Justice Johnson said they were, "the sole objects of the Constitution; treaty provisions as well as Congressional legislation have given and can give newly acquired territories the benefit of those guarantees prior to Statehood.

In *Fleming v. Page*, 9 How. 603, the territory had not been and, in fact, never has been ceded to the United States by treaty, so the case could not be in point. The case of *Fleming v. Page* rightly holds that enemy's country which is occupied by Federal troops during a war, does not by virtue of that occupation become a part of the United States, even though under the rules of international law and comity, other nations must act as if it does; for the reason that every nation holds and acquires territory according to its own institutions and laws, that our relations with conquered territory do not depend upon the law of nations, but upon our own Constitution, and the acts of the proper authorities thereunder, that under our Constitution the power to enlarge the limits of the United States is not given to the President as military commander, but to the treaty making power, or the legislative authority, and that the limits of the United States cannot be enlarged, except by treaty or Congressional legislation.<sup>7</sup> The Court was not con-

---

<sup>6</sup> 1 Peters 542.

<sup>7</sup> Taney, C. J., in delivering the opinion of the court, in *Fleming v. Page*, said: "The port of Tampico, at which the goods were shipped (to the United States) and the Mexican State of Tamaulipas, in which it is situated, were undoubtedly at the time of the shipment subject to the sovereignty and dominion of the United States. The Mexican authorities had been driven out or had submitted to our army and navy; and the country was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President. But it does not follow that it was a part of the United States, or that it ceased to be a foreign country in the sense in which those words are used in the acts of Congress. \* \* \*



cerned with a case where there was a treaty of cession, and it would clearly have made a difference, according to the principle enunciated in the opinion, if the sovereignty over Tampico had been ceded by a treaty. Apart from treaty or legislation, possessions acquired by conquest or cession do not become a part of the United States,

---

"The United States, it is true, may extend its boundaries by conquest or treaty, and may demand the cession of territory as the condition of peace, in order to indemnify its citizens for the injuries they have suffered, or to reimburse the government for the expenses of the war. *But this can be done only by the treaty-making power or the legislative authority*, and is not a part of the power conferred upon the President by the declaration of war. His duty and his power are purely military. \* \* \* He may invade the hostile country and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

"It is true that when Tampico had been captured and the State of Tamaulipas subjugated, other nations were bound to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. \* \* \* As regarded all other nations it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries.

"*But yet it was not a part of this Union.* For every nation which acquires territory by treaty or conquest holds it according to its own institutions and laws. And the relation in which the port of Tampico stood to the United States, while it was occupied by their arms, did not depend upon the laws of nations, but upon our own Constitution and acts of Congress. The power of the President under which Tampico and the State of Tamaulipas were conquered and held in subjection, was simply that of a military commander prosecuting a war waged against a public enemy by the authority of his government. \* \* \* But the boundaries of the United States, as they existed when war was declared against Mexico, were not extended by the conquest; nor could they be regulated by the varying instances of war and be enlarged or diminished, as the armies on either side advanced or retreated. They remained unchanged. \* \* \*

"*And the constituted authorities to whom the power of making war and concluding peace is confided, and of determining whether a conquered country shall be permanently retained or not, neither claimed nor exercised any rights or powers in relation to the territory in question, but the rights of war.* After it was subdued it was uniformly treated as an enemy's country and restored to the possession of the Mexican authorities when peace was concluded. And *certainly its subjugation did not compel the United States, while they held it, to regard it as a part of their dominions, nor to give to it any form of civil government, nor to extend to it our laws.* \* \* \* *Our own Constitution and form of government must be our only guide.* And we are entirely satisfied that under the Constitution and laws of the United States, Tampico was a foreign port within the meaning of the Act of 1846, when these goods were shipped (from there to the United States), and that the cargos were liable to the duty charged upon them" (on their arrival at Philadelphia).

but that is simply a reiteration of the general doctrine that property must be accepted to be acquired, and is but another way of saying that under our Constitution such acceptance is evidenced only when embodied in treaty or Congressional legislation. In *Fleming v. Page* there was neither, and the case is undoubtedly right.

The case of *In Re Ross*, 140 U. S. 453, presents a very different question. There we had a treaty, but it was a treaty which gave us permission to exercise certain rights in territory which was in no sense a part of the United States, and the Supreme Court of the United States expressly based the decision upon the ground that the Federal Constitution can have no operation in territory not owned by the United States. The language of the court in that case is as follows:

"By the Constitution, a government is ordained and established 'for the United States of America,' and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. *The Constitution can have no operation in another country.*"<sup>a</sup>

The case of *In Re Ross* is, of course, suggestive, as showing in the words of Mr. Lowell, that "although the legislative power of Congress might extend beyond the limits of the United States, the limitations imposed upon legislation for the benefit of individuals did not accompany and restrain it,"<sup>b</sup> but it attempts to conclude and does conclude nothing whatever about territory owned in full sovereignty by the United States.

But the most unsatisfactory feature of Mr. Lowell's argument is that he overlooks the fact, and all that it implies, that under the treaty with Spain the United States takes the entire and exclusive sovereignty over Puerto Rico and the Philippines. His argument assumes that because the treaty with Spain does not stipulate what the legal rights of the native inhabitants of the ceded islands shall be, but leaves "the civil rights and political status" of those inhabitants to be determined by Congress, therefore we have a situation essentially different from the conditions which have heretofore confronted us under treaties ceding territory to the United States.

---

<sup>a</sup> 140 U. S., Field, J. (35 Lawyers' Coop. P. Co.'s Ed. p. 586).

<sup>b</sup> 13 Harv. Law Rev. 175.

The treaty, however, does not say that such civil rights and political status shall be determined by Congress unrestrained by any constitutional limitations, or that the ceded islands shall not be regarded as part of the United States, and in fact does not really seem to differ in any essential from the Hawaiian Joint Resolutions, which provide that the Hawaiian Islands "be and they are hereby annexed as a part of the territory of the United States," and which seem to Mr. Lowell to stand on the same footing as our earlier treaties. It is a great mistake to say that it is clear that if the government can acquire possessions without making them a part of the United States, it has done so in the case of Puerto Rico and the Philippines. The fact is that it has done so in the case of Cuba, but not in that of Puerto Rico or the Philippines. A glance at the treaty will make this clear. The following articles of the treaty and parts of articles bear directly on the question.<sup>10</sup>

"ARTICLE I.

"Spain relinquishes all claim of sovereignty over and title to Cuba.

"And as the island is, upon the evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property.

"ARTICLE II.

"Spain cedes to the United States the island of Puerto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrões.

"ARTICLE III.

"Spain cedes to the United States the archipelago known as the Philippine Islands. \* \* \*

"The United States will pay to Spain the sum of twenty million dollars (\$20,000,000) within three months after the exchange of the ratification of the present treaty.

"ARTICLE VIII.

"In conformity with the provisions of Articles I, II and III of this treaty, Spain relinquishes in Cuba and cedes in Puerto Rico and other islands in the West Indies, in the island of Guam, and in the Philippine Archipelago, all the buildings, wharves, barracks,

---

<sup>10</sup> 30 U. S. Stat. at Large, p. 1755 ff.

forts, structures, public highways, and other immovable property which in conformity with law belong to the public domain and as such belong to the Crown of Spain. \* \* \*

"In the aforesaid relinquishment or cession, as the case may be, are also included such rights as the Crown of Spain and its authorities possess in respect of the official archives and records, executive as well as judicial, in the islands above referred to which relate to said islands or the rights and property of their inhabitants. \* \* \*

"ARTICLE IX.

"Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom \* \* \* In case they remain in the territory, they may preserve their allegiance to the Crown of Spain by making before a court of record within a year from the date of exchange of ratification of this treaty a declaration of their decision to preserve such allegiance, in default of which declaration they shall be held to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

"ARTICLE XVI.

"It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy, advise any government established in the island to assume the same obligations."

It will be noticed that the important words in the foregoing are "relinquish" and "cede." Cuba is relinquished; Puerto Rico and the Philippines are ceded. The meaning of both words is plain. By having Spain simply relinquish Cuba, and by becoming ourselves responsible for the island as provided in the treaty, we aimed to make Cuba a sort of possession or charge without its becoming part of the United States, or entitled to the benefit of our Constitution or general laws; and by having Spain cede Puerto Rico and the Philippines we intended to change a military occupation into acquisition and to make the islands an integral part of the United States. Both objects seem to have been accomplished. There would seem to be no room to doubt that Cuba is in exactly the same legal situation with reference to our Constitution and laws as was the State of Tamaulipas in the case of *Fleming v. Page*,

supra; and while the treaty merely says of Puerto Rico and the Philippines, that they, and all public property with them, are ceded to the United States, that would seem to make them a part of the United States, and thereby bound and privileged by its Constitution and general laws. In the words of Chief Justice Marshall:<sup>11</sup>

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation until its fate shall be determined at the treaty of peace. *If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession or such as its new master shall impose.* On such transfer of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved<sup>12</sup> and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it (in the absence of treaty stipulations to the contrary); and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State."

By the phrase "the law which may be denominated political," Chief Justice Marshall, of course, meant to cover Constitutional law. Puerto Rico and the Philippines are as much a part of the United States and as much subject to and protected by the Federal Constitution as was the Louisiana purchase, or has been any other territorial acquisition in our past history.

It is, of course, quite conceivable that the United States may go a few steps farther than it has gone in the case of Cuba, and may some day, by treaty, acquire territory for a naval station, or for some other restricted purpose, or even for general purposes, and may in the treaty of cession provide that the ceded territory is not intended to be and shall not be regarded as a part of the United States, though subject to its full and exclusive sovereignty, that its inhabitants shall remain citizens of the ceding State, that neither they nor their descendants shall ever become citizens of the United States or entitled to any of the guarantees of the Federal Constitu-

---

<sup>11</sup> Amer., etc., Ins. Co.'s v. 356 Bales of Cotton, 1 Peters app. 542.

<sup>12</sup> Here the treaty has saved to Spain the allegiance of all "Spanish subjects, natives of the Peninsula," in ceded and relinquished territory, who within a fixed time make a prescribed declaration of their intention to preserve such allegiance.

tion, unless otherwise specially provided by Congressional legislation, and then only as so specified; and it is quite conceivable that such a treaty would be given effect to in all its provisions by the United States Supreme Court on the ground that such provisions are legitimately within the scope of the treaty making powers, and that such powers are, under the Constitution, of a higher grade than are the limitations of the Constitution.<sup>18</sup> The real value of Mr. Lowell's article lies in the suggestion of such a possibility and of its reasonableness. But such a case is not the one we have under discussion. We are dealing simply with a case where the territory is ceded to the United States for all purposes for which the United States can receive it, and everything is left to Congress to regulate under its Constitutional powers, whatever they may be. Surely, then, there is no Constitutional reason for regarding Congress as having greater powers over such territory than it has been held to have over territory acquired under prior treaties, and we may confidently assert that it has no greater power. On principle and on authority, the provisions of the United States Constitution extend over Puerto Rico and the Philippines, and will so extend until we get rid of these islands.

---

<sup>18</sup> "This Constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land." U. S. Const., Article IV.

GEORGE P. COSTIGAN, JR.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,  
ROBERT H. GOULD,  
LESLIE E. HUBBARD,

WARREN B. JOHNSON,  
ARCHIBALD W. POWELL,  
GEORGE ZAHM.

## Associate Editors:

M. TOSCAN BENNETT,  
JOHN HILLARD,  
WILLIAM H. JACKSON,  
CORNELIUS P. KITCHEL,

GEORGE A. MARVIN,  
ROBERT L. MUNGER,  
HENRY H. TOWNSEND,  
THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

WE take pleasure in announcing the election to the Board of Editors of the JOURNAL of Mr. Warren B. Johnson, 1900, and, as Associate Editors, Mr. M. Toscan Bennett, 1901, and Mr. John Hillard, 1901.

---

## LIMITATIONS OF THE HEIGHT OF BUILDINGS—EMINENT DOMAIN.

The Supreme Judicial Court of Massachusetts in *Attorney-General v. Williams*, 55 N. E. 77, affirms the power of the Legislature to limit the height of buildings for new purposes and on new grounds. The problem was to preserve the beauty of Copley Square, a public park, and save as much light and air as possible to the Boston Public Library, the Museum of Fine Arts, Trinity Church, the New Old South Church, the Second Church of Boston, and the Massachusetts Institute of Technology, which abut on this square. A statute was passed limiting to ninety feet the height of all buildings so abutting. St. 1898 c. 452.

Exclusive of the war-power which may be said to arise from the changed status of the government, the power inherent in every sovereignty to regulate, restrict, or terminate the enjoyment of property by its owner is comprised under three heads, *taxation, police, eminent domain*. The first cannot operate solely upon a single individual, its burdens must be proportionate, and no specific property may be taken except upon failure of the owner to

pay the money sum assessed. The second is of its nature specific, but may be exercised only for the preservation of the public morals, health, peace, or safety. With the last, either as an inherent attribute or subsequent limitation, is connected the right of the owner to just compensation. *Kohl v. United States*, 91 U. S. 371; *Lewis Eminent Domain*, § 3; *Commonwealth v. Alger*, 7 Cush. 53; *Boom Co. v. Patterson*, 98 U. S. 406. But the purposes for which property may be taken are here more numerous by reason of this very restriction of just compensation. It is but a compulsory alienation of the whole or a part to public uses for a fair price. The courts have said in effect that any reasonable benefit or utility to the public under the circumstances of the case would justify the exercise of eminent domain at the discretion of the Legislature. *Olmstead v. Camp*, 33 Conn. 532; *Beekman v. Railroad Co.*, 3 Paige 73. It has been applied in aid of almshouses, cemeteries, memorial halls, monumental statues, public baths, parks, and even a restaurant at a summer resort. As the court in this case says, "the uses which should be deemed public in reference to the right of the Legislature to compel an individual to part with his property for a compensation are being enlarged with the progress of the people in education and refinement." It is only within a few years that lands have been taken for public parks. Now the right to take land for this purpose is generally recognized and frequently exercised. *Foster v. Commissioners*, 133 Mass. 321; *Shoemaker v. United States*, 147 U. S. 282; *Matter of Commissioners of Central Park*, 63 Bart. 282.

The Legislature very wisely, therefore, in considering the capacity in which it should act, chose that of eminent domain, and provided for compensation to those whose property from ninety feet above the earth to the sky was thus taken. And when the constitutionality of the act was brought to bar the court did not hesitate to declare in its favor as in every respect in accordance with the laws regulating the taking of private property by right of eminent domain. The reasons which justify the taking of land for a public park will justify the expenditure of money for its improvement and adornment. The Legislature was seeking to promote the beauty and attractiveness of a public park and to prevent unreasonable encroachments on the light and air it had previously received. The court refused to say that this was not such a matter of public interest as to call for the expenditure of public money, and to justify the taking of private property.

The decision of this point alone would not be so significant as the legislatures of few States could be persuaded to limit the height of buildings around the open squares of their cities and appropriate the money from the treasury to pay the damages. But the statute provided that any damages that might be assessed should be paid from the municipal treasury of Boston, thus placing the burden approximately on those receiving the benefits. Moreover, it is unlikely that in assessing damages the benefit of the improved park to the owner of each particular property was forgotten, and without doubt the burden was very light. Both statute and decision seem to us eminently sensible and replete with suggestion to the legislatures of other States and the people of many of our larger cities.

#### TRADE-NAMES—HISTORICAL SOCIETIES.

The Supreme Court of New York in the recent case of *Colonial Dames of America v. Colonial Dames of State of New York*, 60 N. Y. Sup. 302, has laid down some interesting law on the subject of trade-names. The two societies engaged in the dispute as to the right to use the names they have



adopted, were organized at about the same time. For several years they made no objection to the use of their respective names, and there was no confusion as to their identity, except some confusion of mail. Their purpose was to promote the study of American history, to perpetuate the memory of the men and events of colonial times and preserve the relics of those days. These purposes and aims of the society give a unique aspect to the case. The business character of the associations that had hitherto been interested in legal controversies on the subject of trade-names, had caused the law to develop along a somewhat different line from that pursued by the New York courts in the present case. The damage that would result from the public being misled through a similarity of names, in their dealings with associations of a large and important business character, and the injury to the party aggrieved, has been the controlling influence in the previous decisions of the courts on this subject. We find this well expressed in *Holmes, Booth & Hayden v. Holmes, Booth & Atwood Manufacturing Co.*, 37 Conn. 278, and the principle upon which this subject is founded explained in *Celluloid Manufacturing Co. v. Celluite Manufacturing Co.*, 32 Fed. 94, as well as in the cases cited in *Central Lard Co. v. Fairbank*, 64 Fed. 133. From these authorities we can take it to be the law that a court will interfere by injunction when two business firms have names so similar as to practically perpetrate a fraud on the public, or where the similarity is a source of injury to the party seeking relief in equity.

It is not enough, however, that the public is likely to be misled or that one of the firms is likely to suffer damage. There must be some more definite injury to the party asking for the injunction than what is a mere probability. *Commercial Advertiser v. Haynes*, 49 N. Y. Sup. 438. The present case could have been decided on this point alone. There was no injury suffered by the Colonial Dames of the State of New York, except that a few letters addressed to them went astray in the mails. But the court seems to have gone further. They argue that the public is never likely to be misled, so as to be seriously injured, by an association formed for unselfish and patriotic purposes, and that neither association itself can be injured by the other in what it does for the public through motives of generosity and patriotism. They are not money-making concerns. They do not exist for the financial benefit of their members. They need not fear competition, and their objection to a name similar to that they have adopted is dictated more by jealousy than a legitimate desire to stand their ground in the struggle for commercial existence. There is an inconsistency in an association whose object is to voluntarily glorify the deeds and accomplishments of American history, objecting to any one else doing it under the same name. It is even absurd, and we cannot help but agree with the New York courts in the view they have taken of the present case. Hereafter the first question to be asked in cases of restraint for similarity of trade-names will be: "Do the associations concerned fall within the class designated by the court as those existing for 'patriotic and unselfish ends,' or are they ordinary business firms?"

#### DEAD BODIES—RIGHT TO REMOVE.

In the case of *Toppin v. Moriarity*, 44 Atl. Rep. 469, the Court of Chancery of New Jersey renders a decision of some interest, inasmuch as the controversy was of a rather novel and unusual character. The complainant sought by injunction to restrain the defendant from interfering with the removal of the remains of his daughter, who was the wife of the defendant. On her death bed the daughter expressed a wish to be buried in the same plot with her father and mother. To carry out this wish her

father purchased a plot, in which she was buried, with the concurrence of her husband. Very shortly after the burial, her mother being dissatisfied with the situation of the plot, a new plot was obtained by exchange, and plaintiff was about to disinter the body, when defendant raised objections. The plaintiff had caused considerable money to be expended in erecting a monument and in improving the new plot. The defendant had knowledge of the exchange, and also of the improvements being made, but remained silent.

It has long since been established that the common law recognizes no property right in a dead body, 2 *Black. Com.* 429. It is held, however, that the right of burial is a legal right, and that it rests exclusively, in the absence of a testamentary disposition, in the next of kin—that phrase being construed in favor of the surviving husband or wife. *Durell v. Hayward*, 9 Gray 248; *Weld v. Walker*, 130 Mass. 422; *Larson v. Chase*, 47 Minn. 307; *Foley v. Phelps*, 1 N. Y. App. Div. 551. And that the husband is obliged to bury his wife. *Patterson v. Patterson*, 59 N. Y. 574; *Waesch's Estate*, 166 Pa. St. 204; *Matter of Weringer*, 100 Cal. 345. It has also generally been held that after burial, if all the parties interested have consented thereto, the surviving spouse has no right to remove the body of the deceased against the consent of the next of kin. *Fox v. Gordon*, 16 Phila. (Pa.) 185; *Peters v. Peters*, 43 N. J. Eq. 140; *Pierce v. Swan Point Cemetery*, 10 R. I. 227; *Thompson v. Deeds*, 93 Iowa 228. Nor can the next of kin remove the remains against the will of the surviving spouse. *Secor Case*, Alb. L. J. 70.

The peculiarity of the present case consists in that by reason of the action of the wife's parents, it has become necessary to disinter the remains. In cases of this character the question involved resolves itself into one of duty, rather than of right, strictly, so-called. The court, in granting the injunction, proceeds: "Is the husband in a position to prevent the removal? If I am right in the view I have taken, namely, that he is not vested with a right, but charged with a duty, it is apparent that in designating his wife's father's plot as a final resting place of her remains, and in seeing that she was interred there, he did what would ordinarily amount to a complete performance of his duty. If, in consequence of the new situation, a new duty has arisen, he is in the performance of it, subject to the controlling power of this court as the successor to the ecclesiastical court. If nothing else appeared than that, for some reason or other, it was necessary to remove the body, then he, as husband and administrator, would, a controversy arising, be permitted to select another resting place. But there are two additional facts in the case at bar, which it seems to me make it the duty of the husband to allow his wife's body to be buried in the lot prepared for it. These facts are: First, his wife's request that she should be buried with her family, and his assent thereto after her death; second, his conduct in assenting to the exchange of the lots, and in allowing the work upon the new plot to proceed without objection, at great expense to complainant.

As the fundamental conception in the growth of all law should be that which is just and righteous, it seems that the doctrine established by the case under review is a salutary one. Although the resting place of the dead should at all times be considered as sacred, and an interference with the same ought never be tolerated, save for good reason, and then only with the consent of all immediately concerned, yet to allow one to stand by in silence and permit another to resort to large expenditures in the location of another place of sepulcher, and then, actuated by a malevolent spirit, withhold the necessary consent, thus rendering the labors of such other a practical nullity, would not only shock the conscience, but also pervert those rules of human action, so firmly established, which guide man in his daily relations with others."

## RECENT CASES.

**CHANGE OF VENUE—INTEREST OF JUDGE—PREJUDICE—AFFIDAVIT—INFORMATION AND BELIEF—APPEAL—HIGGINS ET AL. V. CITY OF SAN DIEGO ET AL., 58 Pac. 700 (Cal.).**—Water company had claim against city for use of plant, contingent on sufficient funds in treasury to pay claim, when accrued. *Held*, that interest of judge, who was taxpayer, was too remote to disqualify, though judgment might be foundation of a special tax; and interest being made a special ground of disqualification, cannot be alleged in support of bias; that (1) a *controversy* between city and water company, causing feeling among taxpayers, including judges; (2) a controversy and exchange in newspapers of threats between judge and water company; (3) censure in court of attorney of water company by judge, and resenting of statements in an affidavit by judge, do not show prejudice sufficient to disqualify the judge. *Mere* affidavit on information and belief, unattended by proof, is not sufficient to authorize change of venue.

The Code of Civil Procedure of the State of California contains a provision, now common in many States, that a judge interested in the litigation is disqualified from sitting. The present case, while recognizing that in accordance with American decisions, a judge who is a taxpayer possesses a definable, pecuniary interest, which will be affected directly by a judgment in an action for money damages against a city, yet gives new weight to the distinction which is the essence of the weight of American authority, his distinction is that if the affection of the pecuniary interest of the judge is contingent and dependent upon events subsequent to the rendition of the judgment, that the interest of the judge is too remotely involved and too indirectly affected to create a disqualification. *People v. Edmonds*, 15 Barb. 531. In the present case the possibility was contingent, and as this supposed interest was alleged as a special ground, it was not considered in a second count alleging bias. The final clauses of the decision are well settled law, for in no instance has an affidavit on information and belief standing alone been creative of a change of venue. *People v. McCauley*, 1 Cal. 379. Nor has it ever been considered that censure of an attorney in court or ill feeling toward an attorney by the judge was theoretically detrimental to the interests of the client. Yet in fact these would constitute a slight bias, and in the present case there was evidence of a most bitter personal controversy between the water company officials and the judge previous to his elevation to the bench. The court relies too much on the innate integrity of a judge, and there seems to be no doubt but that a great injustice was done in not permitting a change of venue.

**CONSTRUCTION OF STATUTE—STREET WORK—SECOND ASSESSMENT—EDE V. CUNEO ET AL., 58 Pac. Rep. 538 (Cal.).**—Where it has been provided by statute, that whenever any suit to foreclose an assessment lien for street work has been defaulted by reason of some defect in said assessment \* \* \* any person interested may within three months after final judgment apply to the superintendent of streets, and have another assessment issued in conformity to law. *Held*, that superintendent has no authority to make second assessment for street work when plaintiff's failure to recover on first was not by any defect in assessment, but by reason of absence of a certificate of city engineer and of a record thereof.

As the statute is of a remedial nature, it would seem where injustice would result, that even if the plaintiff were not within the very letter of the

law, but was within the meaning and object, the statute should be liberally construed. *White v. The Mary Ann*, 6 Cal. 462. This position was maintained by the two dissenting judges.

**CORPORATIONS—LIABILITY OF DIRECTORS—ENFORCEMENT AT LAW—AMENDMENT OF COMPLAINT—MARSH V. KAYE ET AL.**, 60 N. Y. Sup. 439 (Supreme Court).—The membership corporation law, Section 11, makes directors "jointly and severally" liable for debts contracted while they are directors, if the action against them to recover the amount unsatisfied against the corporation be commenced within one year after return of execution unsatisfied. *Held*, that the liability is primary, and must be enforced by an action at law, not in equity, as was attempted in the present case. The complainant petitioned that the amounts which the directors were liable to pay might be ascertained and apportioned to the several debts of the plaintiff, and of such other creditors as might become entitled to share in the fruits of the action; and that the defendant creditors of the corporation, and all other persons claiming to be creditors might be enjoined from prosecuting any action at law to recover any debt due from said corporation and from collecting any judgment in any such action. The court, however, considered the relation of these directors to a creditor simply that of joint and several debtors from whom the creditor could recover the amount of his debt by an action at law, and having a remedy at law, no cause of action in equity existed which would entitle him to implead all other creditors with all the debtors who were liable to such creditors for the amount of their claims against the corporation, for the purpose of settling the total amount of such indebtedness in one action. "It is no business of the plaintiff's whether other creditors of the same debtors do or do not prosecute their claims, nor have the other creditors any interest in the recovery by the plaintiff of his claim against his debtors; and nothing alleged in this complaint would justify the court in restraining these other defendants from prosecuting their claims at law, as they have a right to do."

McLaughlin, J., dissents on the ground that the avoidance of a multiplicity of actions is one of the recognized grounds of equity jurisdiction, and that no reason can be assigned why equitable jurisdiction ought not to be sustained to enforce the liability of the directors in the case at bar, to prevent a multiplicity of actions, just as it is sustained in actions against stockholders to enforce their statutory liability, but the majority opinion points out the distinction between the two cases, as follows: "In the case of limited liability imposed upon stockholders, the Legislature created a fund which should be applied to the payment of the corporate debts, and it is apparent that to create and administer that fund, a resort to a court of equity is essential. In the case at bar no liability is imposed to create a fund for the benefit of *all creditors* of the corporation, nor would all creditors be entitled to share in the liability imposed upon the directors, but the directors are made *primarily responsible to each creditor* of the corporation."

The majority of the court held also that it was not error to refuse to permit amendment of the dismissal of a complaint to hold trustees of a defunct corporation liable, the effect of which would be to change the action to one for an accounting against the receiver, when the original complaint contains no allegations as to assets in the receiver's hands, and asks no relief as against him, and does not demand an accounting.

McLaughlin, J., dissented likewise from this opinion on the ground that the complaint was sufficient to enable the court to direct an accounting even without amendment. "Before the plaintiff can subject the directors to the statutory liability," he says, "he must apply towards the payment of the corporate debts all of the corporate assets. A permanent receiver having

been appointed, this can only be done by compelling him to account. Until such accounting be had, and an application be made of the proceeds of the assets held by the receiver, it is difficult to see how a recovery can be had against the directors, because until then the extent of their liability cannot be ascertained."

**CORPORATIONS—SALE OF ASSETS BY ALL STOCKHOLDERS WITHOUT FORMAL ACTION—PURCHASE OF STOCK IN OTHER CORPORATIONS—ULTRA VIRES—DE LA VERGNE REFRIGERATING M. CO. v. GERMAN SAVINGS INST. ET AL., 20 Sup. Ct. Rep. 20.**—A contract for purchase of stock in another company for the purpose of controlling it, unless expressly authorized, is *ultra vires* and void. *Ultra vires* is a good defense to defeat recovery upon an executed contract, although an action upon *quantum meruit* will lie for benefits received. The good will of a company belongs to the corporation, and a transfer of it by all the stockholders without formal corporate action is invalid and confers no benefit. Justices Brewer and McKenna dissenting.

This reverses two decisions of the Circuit Court of Appeals for the Eighth District (36 U. S. A. 184, 49 U. S. A. 777). Although the generally accepted rule seems to be that *ultra vires* cannot be set up by a corporation to avoid its obligation upon a contract performed by the other party (Moraw, § 689 ff.), it is well established in the Supreme Court that such defense is good. The doctrine in this court is that "a contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization \* \* \* is wholly void and of no legal effect." "Nothing done under it, nor the action of the court can infuse any vitality into it." But the court will do justice, so far as possible, by permitting recovery on the implied contract to return or make compensation for property or money which it has no right to retain. *Central Transf. Co. v. Pullman*, 139 U. S. 24, 60-61.

**EXEMPLARY DAMAGES—EJECTMENT OF PASSENGER—IMPLIED MALICE—COWEN ET AL. v. WINTERS, 96 Fed. 929.**—A general passenger agent deliberately repudiated certain tickets that had been sold to the public. *Held*, that a bona fide purchaser of one of these tickets could recover exemplary damages for his ejectment from defendant's train.

The rule in regard to exemplary damages, as laid down in *Railroad Co. v. Prentice*, 147 U. S. 101-107, is now firmly established and well recognized. The present case is interesting as a recent exposition of that rule. The peculiar duties that a common carrier owes to the public makes an abuse of its civil obligations especially serious. It is this feature, the carrier's close connection with the public, that permits a court to grant the rather exceptional remedy of exemplary damages. The facts in the present case seem to justify the court in holding as it has. But any extension of rule beyond the principles laid down in *Railroad Co. v. Prentice* above, should be viewed with concern, especially in view of the present apparent hostility to large corporations.

**DEAD BODIES—RIGHT OF WIDOW TO REMOVE HUSBAND'S REMAINS—60 N. Y. Sup. 539 (Supreme Court).**—A widow freely consenting to the interment of her husband's body in a certain burying ground, is estopped from removing it. But when, at the time of his death, she was in feeble health and became nearly frantic during the time which preceded the burial, she should not be regarded as consenting that the place of burial be permanent.

It has long since been established that the right of burial is a legal right. *Foley v. Phelps*, 1 N. Y. App. Div. 551; *Pierce v. Swan Point Cemetery*, 10 R. I. 227; 14 Am. Rep. 667; *Matter of Widening Beekman St.*, 4 Bradf. (N. Y.) 503;

*Remikan v. Wright*, 125 Ind. 536, and that the surviving husband or wife, as the case may be, controls this right rather than the next of kin. *Weld v. Walker*, 130 Mass. 422; *Durell v. Hayward*, 9 Gray (Mass.) 248; *Larson v. Chase*, 47 Minn. 307; *Burney v. Children's Hospital*, 169 Mass. 57, 47 N. E. 401.

Though it is well established that after a burial, with the free consent of the person having the right to control the same, such person is estopped from removing the remains. *Fox v. Gordon*, 16 Phila. (Pa.) 185; *Peters v. Peters*, 43 N. J. Eq. 140; *Thompson v. Deeds*, 93 Iowa 228. Yet if the remains have been buried without such free consent, a court of equity may permit such person to remove them. *Weld v. Walker*, 130 Mass. 422; *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42.

**HOMESTEAD LIEN—BORROWED MONEY—CONTRACT—INDEBTEDNESS INCURRED AFTER HOMESTEAD RIGHT ATTACHES—JOHNSON COUNTY SAVINGS BANK V. CARROLL**, 80 N. W. 683 (Iowa).—Where a creditor loans money on security, which is thereafter lost, he is not entitled to a lien on the homestead although the money loaned was used to pay part of the purchase price.

Robinson, C. J., dissenting on the ground that same gives to the defendant property which he never paid for, and holds it exempt from liability for the purchase price actually paid by another.

In *Eyster v. Hatheway*, 50 Ill. 521, and *Mitchell v. McCormick*, 50 Pac. 216, it was held that, in order to raise a lien on the homestead, it is not enough to show that the borrowed money was used to pay for the homestead, but it must also appear that it was a part of the contract that this should be done.

In *Williams v. Jones*, 100 Ill. 362, it was held that, although there be a waiver of the vendor's lien by taking other security for purchase money furnished, the holder of the indebtedness will not thereby lose the protection of the statute which provides that a homestead is not exempt from sale for a debt or liability incurred for the purchase or improvement thereof.

In *Christy v. Dyer*, 14 Iowa 438, it was held that a debt for the purchase money of premises occupied by the debtor as a homestead, is not a debt arising after the purchase of such homestead; and the homestead may, therefore, be subjected to the satisfaction of same.

**INJUNCTION—LABELS—USE OF PRIVATE NAME AND LIKENESS—ATKINSON V. JOHN E. DOHERTY & CO.**, 80 N. W. 285 (Mich.).—Equity will not restrain the use of the name and likeness of a deceased person as a label to be used in the sale of cigars named after him, though he may not have been a public character, so long as it does not amount to a libel.

This case has aroused wide-spread comment throughout the country, as deciding that there is no law in Michigan against bad taste, and involves a discussion of the law in regard to the so-called "right to privacy." How much property right has a person in his name and portrait?

In *Schuyler v. Curtis*, 19 N. Y. Sup. 264, 64 Hun. 594, the Supreme Court held that a preliminary injunction would be at the instance of the relatives of a deceased woman to prevent her statue from being exhibited at the World's Fair, and designated "The Typical Philanthropist." The case was afterwards heard and a decree entered in accordance with the prayer of the bill. *Schuyler v. Curtis* (Sup. 124 N. Y. Sup. 509). This decision was squarely in conflict with the doctrine laid down in present case, but was reversed by the Court of Appeals in 1895. See 42 N. E. 22, Gray, J., dissenting, the opinion holding that "a woman's right of privacy, in so far as it includes the right to prevent the public from making pictures and statues of her, does not survive her, so that it can be enforced by her relatives." In *Marks v. Jaffa*, 26 N. Y. Sup. 908, publication of portrait was enjoined apparently on the strength of *Schuyler v. Curtis*, not then reversed.

*Corliss v. Walker*, 31 Lawy. Rep. Ann. 283, and note (S. C. 57 Fed. 434, and 64 Fed. 280), denied an injunction to restrain the publication of a biography of the great inventor, but granted it to restrain the publication of his portrait. Subsequently this injunction was dissolved, on the ground that the deceased was a public character, not a private individual. In the case under discussion the court in commenting on the Corliss case questions the wisdom of the distinction, and says: "We are loath to believe that the man who makes himself useful to mankind surrenders any right of privacy thereby."

In *Murray v. Engraving Co.*, 28 N. Y. Sup. 271, it was held that a father could not prevent the unauthorized publication of his child's photograph, for the law takes no cognizance of a sentimental injury independent of a wrong to person or property.

There are many authorities to the effect that a private individual has a right to be protected in the representation of his portrait in any form, and that this is a property as well as a personal right. Cf. *Gee v. Pritchard*, 2 Swanst. 402; *Folsom v. Marsh*, 2 Story 100, Fed. Cas. No. 4901; *Tipping v. Clarke*, 2 Hare 383, 393; *Prince Albert v. Strange*, 1 Mach and G. 25. But the court in the present case decides that the alleged right to privacy is not under this particular state of facts a property right, and that so long as the publication of the portrait does not amount to a libel, a court of equity will not protect the relatives of the deceased against a mere injury to their feelings, although a violation of the canons of good taste. "The law," says the court, "does not discriminate between persons who are sensitive and those who are not."

INSOLVENT CORPORATIONS—SECRET PREFERENCE OF CREDITORS—UNITED STATES RUBBER CO. ET AL. V. AMERICAN OAK LEATHER CO., 96 Fed. 841.—Where a corporation that is about to fail, in order to gain time and borrow money, makes an arrangement with some of its creditors whereby they are to be put in charge of the concern and be given judgment notes covering what is due them and thereby are to prevent preferences to other creditors, such an arrangement is a fraud in fact on the general creditors.

Courts have recognized the justice of allowing embarrassed concerns to tide over difficulties by using their property in any way they may see fit. *Preston v. Spaulding*, 125 Ill. 20; *White v. Cotshausen*, 129 U. S. 329. But they have further recognized that one cannot convey all his property and stop doing business. *Kelloy v. Richardson*, 19 Fed. 70, 72. It then becomes a question of what was the intention of the insolvent concern in entering into obligations like those in the present case. How close a question this often is, is well illustrated by the case before us. We see how frequently the judicial mind may differ on this point, and in view of the large interests that may be concerned in such case, how important it is that a transaction should be considered as actually fraudulent only on the strongest proof or actual knowledge. *Street v. Bank*, 147 U. S. 36.

INSURANCE—AGENT—AUTHORITY—NOTICE—POLICY—ENDORSEMENT—WARRANTY—NORTHRUP ET AL. V. PIZA, 60 N. Y. Supp. 363.—A fire insurance policy was issued by general agents and attorneys of a fire insurance company on recommendation of a firm of fire insurance brokers, said policy containing material warranty on the part of the insured. Subsequently an addition was made to the policy in which no mention was made of the warranty. Held, that a broker having only authority to solicit risks, recommend same, and receive premiums (these services being paid for by commissions), is not an agent of the insuring company, and hence notice to him is not notice to the company. Also that attachment of said endorsement, see *supra*, did not abrogate original warranty clause.

The defense in the original action rested on the ground that no notice had been given of the falsity of a material warranty in the original policy as to the existence of certain division walls, and that the waiver of the warranty by the insurance brokers was ultra vires. Particular importance is given to the prevailing doctrine that insurance brokers are not agents, the leading case mentioned being *Allen v. Insurance Co.*, 123 N. Y. 6. The many cases contra are not now considered of authority. The court argues that the endorsement, containing no mention of the warranty, but reiterating the original policy in other respects, and subsequently added to the policy, was not a waiver, because not conflicting with original form of policy. It is clear that this is not the real reason, for the endorsement did not act as a waiver, because it was added (according to the evidence) by the brokers, who were not agents, and therefore had no authority to waive a warranty. The dissenting opinion is a most thorough demonstration of the possibility of waiver by such an endorsement, but does not even allude to the possible lack of authority on part of the brokers. This disregard of the vital question makes the dissenting opinion of no weight whatever. The brokers were not agents, had no authority to waive conditions, and notice to them was not notice to the company or its agents. *Smith v. Farmers' Mut. F. Ins. Co.*, 19 Ohio St. 287; *Devens v. Mechanics, etc., Ins. Co.*, 83 N. Y. 168.

**MUNICIPAL BONDS—DEMAND—PRIORITIES—MEYER v. WIDBER, TREASURER** (Bohen, Intervener), 58 Pac. Rep. 532 (Cal.).—*Held*, that where under statute damages to abutting property owners are to be paid only in bonds, it is no defense to a mandamus compelling payment of a bond, that other bondholders had made prior demands, which had been refused for lack of funds. Beatty, C. J., Temple, J., and Henshaw, J., dissenting.

The decision of the court is without doubt correct. The demand upon the treasurer, when he had funds applicable for the purpose, gives the parties demanding, upon refusal of their demand, the right to a mandamus. *Meyer v. Porter*, 65 Cal. 67. The fact that the intervener neglected to follow up his demand by an action would not give him a preferred claim over one who made a subsequent demand and chose to enforce his right. It has been held that a judgment creditor of a county who had received a warrant on the treasurer, which was refused payment, might have mandamus to enforce collection of a tax to pay such judgment, and that he is not bound to wait and take his turn among other warrant holders. 2 *Cent. Law Journal* 771.

The chief justice, who dissents, contends that the intervener should be given priority in payment, for, having made a prior demand, the treasurer was legally obliged to make payment, unless the intervener had forfeited his rights. Furthermore, that it was the duty of the appellant to show that when he commenced his proceeding, that those who had made prior demands had lost their right of action. This the appellant failed to do. The contention is also made that if the doctrine of this case is carried to its logical conclusion, the custodian of a fund in the position of the defendant may pay or refuse those who make demands, irrespectively, unless sued, or he may refuse all until some favored claimant serves him with a writ of mandamus. The judge, however, fails to cite any authorities in support of this reasoning.

**MUNICIPAL CORPORATIONS—ORDINANCES—HACK STANDS IN STREETS ADJACENT TO RAILWAY DEPOTS—PENNSYLVANIA CO. v. CHICAGO**, 54 N. E. 825.—The Union Depot, leased by the Pennsylvania Company and used by several different railways, fronts on Canal street, between Madison and Van Buren. All through tickets of lines using this depot bear coupons for conveyance through the city of Chicago from this station to the station of the connecting line, and each railway company has a contract for the use of a line of coaches for the performance of this service. A portion of the rail-



roads' own ground is used by the vehicles of this line of coaches, from whence they may be called by electric bells to the different exits from the depot. The city of Chicago by ordinance established the east side of Canal street, between Adams and Madison, as a place where hacks were permitted to stand. The Railway Company brought a bill, praying for an injunction restraining the city from continuing the stand for hacks, on the ground of irreparable injury by reason of interference, interruption and daily inconvenience to the complainants, amounting to an interference with their private rights, and causing an unjust burden upon their property without compensation. And, further, that it gives for private use a portion of Canal street, which is held by the city in trust solely for use as a public street. *Held*, the ordinance is a reasonable and valid exercise of the powers conferred upon the Common Council of the city of Chicago. Decree of lower court dismissing bill affirmed.

The doctrine of the court is that a railroad is a quasi-public corporation, and a railroad depot a public building. The special easement of the abutting owner in the case of a building used for public purposes, though privately owned, inheres in the city as trustee for the public. That it may, as a benefit to the public, and to prevent the railroad company from monopolizing the business of transfer, permit hack stands at such places. *Cf. Railroad Co. v. Langlois*, 9 Mont. 419; *Railroad v. Tripp*, 147 Mass. 43; *Marriott v. Railway*, 1 C. B. (N. S.) 499; *McConnell v. Pedigo*, 92 Ky. 405; *State v. Reed*, 24 Lou. 308 (Miss.).

Cartwright, C. J., dissents. The occupation of a street as a place for the owners of hacks, carriages, and express wagons to keep them while waiting for employment in the carriage of persons or property, is a purely private use. It is of the same nature as the occupation of premises as a stable yard. *Rex v. Cross*, 3 Camp. 224; *Branahan v. Hotel Co.*, 39 Ohio St. 333; *McCaffrey v. Smith*, 41 Hun. 117. Such a use is a perversion and violation of the trust on which the city holds the streets. 2 *Dill. Mun. Corp.* § 660; *Com. v. Passmore*, 1 Serg. and Rawle 217; *Lockwood v. Railroad Co.*, 122 Mo. 86. Injunction is a proper remedy. *High Injunctions*, 3d Ed. § 816; *Hill. Inj.*, 273; *Greene v. Oakes*, 17 Ill. 249.

**MUNICIPAL CORPORATIONS—RIPARIAN OWNERS—POLLUTION OF WATER COURSES BY SEWAGE—INJUNCTION—CITY OF VALPARAISO V. HAGEN**, 54 N. E. 1062 (Ind.).—The sewage system of Valparaiso, a city of 8,000 inhabitants, discharges 47,000 gallons of sewage daily into a marsh that drains into Salt Creek. The city further arranged for a direct outlet by the extension of its main sewer through the marsh to Salt Creek. Nineteen owners of lower lands abutting on this stream brought a bill praying that the city be enjoined forever from constructing said sewer outlet, or emptying the sewage of the city into said stream. Upon error for demurrer, overruled, *held*, failure to aver the absence of skill or want of due care, or that some other outlet could more reasonably be had, or that some other reasonable method of disposing of city sewage is available, is a fatal defect and the demurrer should be sustained.

The right of the riparian owner is not absolute, but a natural one, qualified and limited like all natural rights by the existence of like rights in others. His enjoyment is prior to those below him and subsequent to those above. *Merrifield v. Worcester*, 110 Mass. 218. The city of Valparaiso is an upper riparian owner. As such it has rights to the use of Salt Creek, though these rights are correlative with those of other riparian owners on the same stream. *Bassett v. Salisbury Mfg. Co.*, 43 N. H. 569. Any damage resulting from acts of the city in a reasonable exercise of these rights would be *damnum absque injuria*. It must be presumed that public officers will perform their duties reasonably and with due care, therefore, injunction will not lie.

**PARTNERSHIP—CONTINUANCE OF BUSINESS WITH CONSENT OF EXECUTRIX—WHAT IS FIRM PROPERTY—REAL ESTATE—DEXTER V. DEXTER ET AL., 60 N. Y. Sup. 371.**—Father and son were co-partners in business and tenants in common in certain real estate. On the death of father, said son and a second son became co-partners in same business, each making certain conveyances of real estate to the other, in order to equalize their partnership interests and their separate interests in real estate left by their father. First son died, and, with consent of his executrix, the survivor carried on business until failure took place. *Held*, death of partner ends partnership and power to carry on partnership business; sanction of continuance of business by executrix of deceased partner renders said executrix a creditor of surviving partner of equal grade with other creditors, to the amount of the value of whatever interest in firm that is lost by him; real estate inherited by co-partners is not firm property, if merely occupied and not otherwise used.

The prevailing opinion holds that in the absence of express provisions in will of deceased partner, or in articles of partnership, the partnership is dissolved, and that if surviving partner continues business with consent of executrix of deceased partner, he does so as an individual, and all debts contracted by him in the conduct of the business or by the borrowing of money are due from him as an individual, for reason that he conducts the business as an individual, as a surviving partner, in whom the entire title to the partnership property is vested. There seem to be several faults in this reasoning. First, it is generally considered that a business may be continued with consent of representatives of deceased partner, and even if in line with some decisions, a business so continued is considered a new partnership (Parsons on Partnership, Sect. 343), the liability of the surviving partner is not individual, but is that of a co-partner. Secondly, the title of a surviving partner is complete only for purpose of liquidating the affairs of the firm. The doctrine of the dissenting opinion seems the better one, that the claim of the executrix and devisee of the deceased partner was subordinated to the claims of the creditors of the continued business, and that an individual creditor would be subordinated to both executrix and creditors of continued business. A curious statement exists at the close of the prevailing opinion, to the effect that an individual creditor of the surviving partner would take precedence of the rights of the receiver. This is without any support of principle or authority. Because certain land was merely occupied by co-partnership, but not otherwise used, and not purchased with partnership assets, it was held not to be partnership property. The best rule is clearly this: that land improvements and taxes upon which were paid out of partnership assets, and which was regarded as firm property, is firm property. *Fairchild v. Fairchild*, 64 N. Y. 471; *Ross v. Eldred*, 73 Cal. 394.

**PERSONAL INJURIES—ADMISSIBILITY OF EXPERT TESTIMONY—CROUSE V. CHICAGO & N. W. RY. CO., 80 N. W. 752 (Wis.).**—In an action for personal injuries, *held*, that it is error to permit testimony that the plaintiff would require medical attention in the future and to what extent. Dodge and Winslow, JJ., dissenting.

The advancement of the sciences and the progress of research in special fields of knowledge have made expert testimony of large importance during the present century. The basis of its admission is the fact that there are certain processes of reasoning which an ordinary jury is incapable of performing, even with the assistance of courts and juries. Hence, the general rule is that experts may give their opinions upon questions of science, skill, or trade, or others of the like kind, or when the subject matter of injury is such that unexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance, or when it so far partakes of the nature of a science as to require a course of previous habit or study, in order to the attainment of a knowledge of it; and the opinion of

experts are not admissible when the inquiry is into the subject matter, the nature of which is not such as to require any peculiar habits or study in order to qualify a man to understand it. *Jones v. Tucker*, 41 N. H. 546; *New England Glass Co. v. Lowell*, 7 Cush. 319; *Graham v. Pann Co.*, 139 Pa. St. 149.

In the present case the doctor was allowed to testify that the plaintiff was rendered a helpless paralytic by the injury and that such condition is likely to be permanent. This seems to be in accordance with the general rule, that an expert can testify as to the effect, nature, and extent of personal injuries, and what are the probable results that would follow from an injury. *Albert v. N. Y. L. E. W. R. Co.*, 118 N. Y. 77; *Fiber v. N. Y. Central R. Co.*, 49 N. Y. 42; *Rowell v. City of Lowell*, 11 Gray, 420; *Evansville & T. H. R. Co. v. Crest*, 116 Ind. 446; *Louisville N. A. & C. R. Co. v. Wood*, 113 Ind. 54.

In *Fiber v. New York Central R. R. Co.*, Allen, J., in the opinion of the court says there is no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has been or can be permanently cured or what its effect will be upon the health and capability of the injured person in the future.

In *Albert v. N. Y. L. E. W. R. Co.*, the witness was asked to state length of time plaintiff might live in the natural course of events, and it was held to be no error.

Thus it would seem to follow as a natural consequence that testimony that plaintiff would require medical attention and nursing in the future, and to what extent, would be admissible, but the court excluded it upon the somewhat inconceivable ground that such evidence entered the domain of *common knowledge*, and that the jury were as able to arrive at that conclusion without the aid of his opinion as with it. In the course of the opinion of the court, Bardeem, J., remarks: "There are experts and experts, and many of them testify like retained witnesses, and that very much of such testimony is of little more value than an intelligent guess," but we are unable to see how that which simply affects the credibility of a witness can bar the admissibility of his testimony. The rules affecting credibility of witnesses and admissibility of evidence are separate and distinct.

One of the objections to the admissibility of the testimony is, says the learned judge, that its tendency was to increase the damages and swell a recovery. But what could be more reasonable for to quote from a prior part of the opinion, "it is sufficient if the damage claimed legitimately flows directly from the negligent act, whether such damage might be foreseen by the wrong doer or not."

In a dissenting opinion, Dodge, J., says that while "the testimony may approach the field of common knowledge, from which expert testimony should be carefully excluded, it does not prejudicially cross the line." The present case was one of severe spinal injury and disordered nervous system, with which the ordinary juror is strangely unfamiliar, and in which the opinion of a physician would be very valuable, while a non-professional would be totally at sea. In short, the testimony in reality did not invade the ground of common knowledge, but merely invoked the peculiar knowledge and opinion of a medical expert, and for this reason should have been held admissible.

**PUBLIC LANDS—MEXICAN GRANTS—RIGHTS OF INDIANS—HARVEY ET AL. V. BARKER ET AL.**, 58 Pac. Rep. 692 (Cal.).—Defendants, Mission Indians, claimed a prescriptive title to certain lands included within the boundaries of a Mexican grant, which grant was confirmed by the United States and a patent thereto issued to plaintiff's grantor. Defendants did not present their claim to the land commissioners for confirmation, as provided under Act Cong., March 3, 1851. Plaintiff took the land subject to the condition that he should not interfere with roads, cross roads and other usages (*servidumbres*). *Held*, that said grant was not subject to any right or interest in the defendants, and that no trust relation existed between the grantor and defendants.

The decision is by an evenly divided court. The dissenting judges seem to adopt the better line of reasoning, which is borne out by a long line of decisions. *Teschmacher et al. v. Thompson et al.*, 18 Cal. 11. When Mexico gained her independence it was declared that all inhabitants, including Indians, should be considered citizens, and that the property of every citizen should be respected and protected. *Treaty of Guadalupe Hidalgo*. Mexicans who, previous to the acquisition of California by the United States, had acquired title to lands from that government, and who chose to remain, held such title and were protected the same as if no change in sovereignty had occurred. *Phelan et al. v. Poyoreno et al.*, 74 Cal. 448.

The defendants relied upon *Byrne v. Alas*, 74 Cal. 628, which is an almost parallel case. Here, as in the case under consideration, the appellants failed to present their claim to the land commissioner. The court held that it was not necessary, and that they were not even charged with knowing that there was such a commission.

C. J. Beatty, who dissented, pointed out that the only difference in the case under review and *Byrne v. Alas* was that there was no provision quoted, that the plaintiff took the land subject that he should in no way disturb nor molest the Indians who were living thereon. But he calls attention to the fact that the plaintiff should not interfere with roads or other "servidumbres," and that the word "servidumbres" had a meaning in Spanish law broad enough to include the right of occupancy claimed by the defendants.

In addition to the above, another of the dissenting judges contended that the defendants would still have had the right to occupy the land had there been no express reservation, for the Indians being mere wards of the nation, it is to be presumed that the nation has always recognized and protected their customary rights, and that all grants are made with the understanding that grantees know those rights, and take subject to them.

**RAILROADS—INJURY TO ADJOINING LAND—SYRACUSE SOLAR-SALT CO. v. ROME, W. & O. R. R. Co.**, 60 N. Y. Sup. 40.—Where a railroad company operated under statute and municipal license its track upon a city street, and thereby cart such dirt, cinders and soot upon the plaintiff's premises adjoining, as to cause him great damage in the prosecution of his business, the manufacture of salt, diminishing its quantity, quality and value. *Held*, that the plaintiff was entitled to compensation.

The defendant in this case relied, with apparent reason, on the case of *Forbes v. Railroad Co.*, 121 N. Y. 505. It was held in that case that a railroad operating its road under proper authority upon a city street, took no adjoining property and was not liable to the owner of such property for any consequential damages resulting from a natural use of the road for railroad purposes.

But that decision is now limited by this case, the court saying that it is a "very broad statement of the rule and must be taken with some qualification."

The Legislature may authorize a small nuisance, but where it greatly exceeds the nature of an inconvenience and causes great damage, compensation must be allowed.

The court holds that this case presents the fact of a taking of plaintiff's property, because proprietary rights must be considered here as valuable property. *Arimond v. Green Bay, etc., Co.*, 31 Wis. 316, 335. Such use is an easement on the plaintiff's property. 2 *Washburn on Real Property*, 4th Ed. 299; *Long Island R. R. Co. v. Garvey*, 159 N. Y. 338.

**SALE OF LIQUOR BY DRUGGIST—TOWN ORDINANCE—PEOPLE v. BRAISTED**, 58 Pac. Rep. 796 (Colo.).—A town attorney furnished a person with money to purchase liquor from a druggist who had no permit. By such a sale the druggist would violate a town ordinance. *Held*, that the town could not recover a penalty for a violation of its ordinance instigated and procured by its officer.

Although there are few cases involving this principle, the decision seems to be correct. It was held, in *Love v. People*, 160 Ill. 501, where a detective by a previously arranged plan with the owner of a building induced certain persons to enter the building and take money from a safe, with the sole intent of entrapping them, that they could not be convicted of crime. In his opinion on the case under consideration, the judge relies on *Ford v. City of Denver*, 10 Colo. App. 500, where it was held public policy will not permit a municipality to derive profit from unlawful acts which are deliberately instigated by its officers. To hold that a town attorney can involve a person in a violation of an ordinance, that he may pursue him for a penalty would seem a most pernicious doctrine.

STATE APPROPRIATION TO NORMAL UNIVERSITY—CONSTITUTIONALITY—*BOEHM V. HERTZ*, 54 N. E. 973 (Illinois).—The Constitution of Illinois provides: "The State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of, any public or other corporation, association or individual." The Legislature passed an act making an appropriation "for the ordinary and other expenses of Illinois State Normal University and for the completion and equipment of its gymnasium building." One Boehm, a taxpayer, brought a bill praying for an injunction restraining Hertz, the State treasurer, from paying any money appropriated under the act. Held, act constitutional, bill dismissed.

The corporation was in existence prior to the adoption of the Constitution and had received the interest of a fund called the College and University Fund, provided for in the act for the admission of the territory of Illinois as a State. Any subsequent limitation of its powers to do so must be found expressed or arising by necessary implication in the Constitution. They are not so found, and the corporation may receive. May the State give? The Constitution also provides that "The General Assembly shall provide a thorough and efficient system of free schools." There is no limitation in the Constitution as to the agencies the State shall adopt in providing this system of free schools. *Speight v. People*, 87 Ill. 600. Normal schools are public institutions which the State has a right to establish and maintain for the purpose of carrying out the policy of the State with reference to free schools. *Burr v. City of Carbondale*, 76 Ill. 455.

SET OFF—JUDGMENT—GROUNDS OF OBJECTION—*BACON V. REICH*, 80 N. W. 278 (Mich.).—One being sued on a contract which he made with a corporation, since insolvent, by one to whom the corporation had assigned the claim, can set off a judgment obtained by him against the corporation, for a breach of the contract, in proceedings instituted by him subsequent to the assignment by the corporation of the claim against him, where he had no knowledge of the assignment when he took his judgment.

That a claim becomes merged in the judgment is elementary. According to the more recent cases this principle is supported on the grounds that the allowance of a new suit is a superfluous and vexatious encouragement to litigation, injurious to the defendant, and of no benefit to the plaintiff. 15 *Am. & Eng. Enc. Law*, 339, and cases cited. This doctrine, however, if vigorously applied, may work hardship and injustice, and it seems to be lawful to disregard it in some cases. *Wilson v. Tunstall*, 6 Tex. 221; *Wood v. Gamble*, 11 Cush. 8; *Railroad Company v. McHenry*, 17 Fed. 414; *Ferrall v. Bradford*, 2 Fla. 508; *Clark v. Rowling*, 3 N. Y. 216; *Stevens v. Damon*, 29 Vt. 521; *Cramer v. Manufacturing Co.*, 93 Fed. 636; *Fox v. Althorp*, 40 Ohio St. 32.

STREET RAILWAY—LICENSE—RECEIVERS—IMPROVEMENT OF MORTGAGED PROPERTY—*ROCHESTER TRUST AND SAFE DEPOSIT CO. V. ROCHESTER AND I. R. CO. ET AL.*, 60 N. Y. Sup. 409 (Supreme Ct.).—An electric railway

passed under the right of way of a steam railroad, under an agreement that on sixty-days' notice it would erect permanent undercrossings of substantial masonry. After the electric road had passed into the hands of a receiver, the railroad served the sixty-days' notice. The court *held* that the permission to cross the right of way was a mere license which the railroad could revoke at any time, and, since the railroad had not been made a party, the court would not authorize the receiver to issue certificates to erect the permanent improvements, but would leave the purchaser at the receiver's sale to assume the responsibility of making them.

Two important questions are here discussed. The court decided that the electric road had a mere license, and no easement in the property of the steam railroad, since no grant had been made by deed, without which no easement can exist. Cf. *White v. Railway Co.*, 139 N. Y. 24, 34 N. E. 887. This being so, would the construction by the electric railway company of the permanent undercrossings create an equitable estoppel which would operate to prevent a revocation of the license, on the ground that the licensee had entered upon the land of the licensor and expended thereon labor and money upon the faith of the license? The court deemed it unnecessary to answer this question, since the steam railroad had not been made a party to the action and would not be bound by any decision affecting its rights in the undercrossings, but cited with apparent approval *White v. Railroad Co.*, *supra*, which decided that no equitable estoppel would arise under such circumstances, "because it must be held that the licensee knew that the license gave him no interest in the land, and that he must rely upon the indulgence of the licensor, and if that be withdrawn, he must himself withdraw from the land; otherwise, it is said, the statute in regard to the creation and conveyance of interests in land would be in great part abrogated."

The second question discussed is the right of a receiver to issue certificates in payment for permanent improvements to the road, thus creating a lien on the property prior to that of the mortgagees. The court held that the purpose for which receiver's certificates may be issued is usually confined to *making necessary repairs and protecting the property as it is*. The propriety of every expenditure is to be judged by the necessity of making it in order to preserve the value of the property in the hands of the receiver. The generally recognized rule is that the original construction creditors have no superior equity. In *Wood v. Deposit Co.*, 128 O. S. 416, 9 Sup. Ct. 131, it was held that the doctrine of *Fosdick v. Schall*, 99 O. S. 235, applied to *operating expenses only*, and *not to a contract in the ordinary construction of the road*. Applying these doctrines to the case at bar, the court decides "that it has no power to impair the obligations of a mortgage contract by creating a prior lien, without the mortgagee's consent, unless it be in the exercise of an equitable power to preserve and protect the property, and that it has no power through its receiver to complete unfinished work or to erect new bridges or undercrossings under a pre-existing contract, beyond what is necessary for the preservation of the property of the corporation."

**TRADES UNIONS—REFUSAL TO WORK WITH MEMBERS OF OTHER UNIONS—REFORM CLUB OF MASONS AND PLASTERERS, KNIGHTS OF LABOR OF CITY OF NEW YORK ET AL. V. LABORERS' UNION PROTECTIVE SOCIETY ET AL.**, 60 N. Y. Sup. 388 (Supreme Court, Special Term, New York County).—Motion to continue a preliminary injunction obtained against defendants, on the ground that the defendant's members refused to work with members of the plaintiff association, under circumstances where the natural effect of the expressed refusal would be to cause the dismissal of the latter class.

The court denied the motion and vacated the preliminary injunction, holding that such refusal of the defendants did not amount to a conspiracy to prevent an employment of the plaintiffs *under all circumstances*, and in the absence of instances of intimidation or of false statements as to the character of the laborers affected, the case disclosed nothing unlawful in the attitude of the defendants.

The court seems to infer that had the facts disclosed a conspiracy to prevent an employment of the plaintiffs *under all circumstances*, a permanent injunction would have been granted. Yet, if the defendants had sought to prevent all employment of plaintiffs, but had done nothing else to accomplish this purpose except refusing to work with them and inducing other workmen to likewise refuse, it is hard to see how this would have been an unlawful conspiracy. Certainly it would not if the leading English authorities are to be followed, for *Mogul S. S. Co. v. McGregor*, L. R., 1892, App. Cases 25, decides that the mere fact of *combination* does not make an act unlawful, and *Allen v. Flood*, L. R., 1898, App. Case 1, holds that a malicious purpose does not make an act unlawful, if the act in itself be legal. The act of refusing to work with other men is perfectly lawful in itself, even though there be behind it the malicious intent to prevent all employment whatsoever. It is persecution, but persecution by lawful means, which cannot be reached at law, according to the English doctrine, unless the unlawful element of intimidation appear.

In this case the plaintiffs asserted that intimidation could be inferred from the dismissal, and cited *Coons v. Chrystie*, 53 N. Y. Sup. 668, to support them, but the court held that case to have no application to the present facts. "In that case the suit was by the employer of laborers, whose business was damaged by the defendant union's acts in prohibiting its members from continuing their work; and it was held that the *coercion of the laborers by the union was apparent and sufficient* to sustain an action by the employer. In the case at bar, the *willingness of defendant's members to obey its orders is not placed in question*, and the effect of the defendant's acts upon the employers of the members of plaintiff association does not amount to unlawful coercion under the authorities.

For an extension of the doctrine of intimidation, see *Boutwell v. Marr*, 42 Atl. Rep. 607 (Vt.), which holds that any association which obtains unanimous consent from its members to its action by means of a coercive penalty or by-law, is founded upon coercion, and that the united action of the association obtained by this coercive means is equivalent to actual intimidation employed by an unorganized body of men. An application of this doctrine to labor unions, some of which certainly make use of such a coercive penalty to obtain unanimity, might well supply the element of intimidation not apparent on the face of such proceedings as those discussed in this case.

## BOOK REVIEWS.

**American Bankruptcy Reports. Annotated. Vol. I. Edited by William Miller Collier. Matthew Bender, Albany, N. Y. Sheep, pp. 782.**

The uncertainty which attends the interpretation of a new law assures a hearty welcome to any attempt at bringing the decisions under it within a narrow compass. This is particularly true in regard to the recent Federal Bankruptcy Act, as it is of every-day importance to the general practitioner. Volume one contains not only the decisions of the judges of the several courts, but also the opinions of the referees which, although not conclusive, must be of great assistance in throwing light on questions of first impression and matters of procedure. The supplementary notes are very full and contain numerous citations of the decisions under the former State and Federal Bankruptcy Acts and references to the leading text-book and magazine articles.

**A Treatise on the Law of Bankruptcy. By John Lowell, LL.D., and James Arnold Lowell. Little, Brown & Co., Boston, 1899. Sheep, pp. 787.**

Part One is the work of the late John Lowell, judge of the District Court of the United States, for Massachusetts, from 1865 to 1878, and of the Circuit Court of the United States, for the First Circuit, from 1879 to 1884. The common features of bankruptcy acts and the general principles of law which have been deduced from them are arranged and discussed under headings which do much to simplify a subject of difficulty to the average student. The citation of cases in the foot-notes is very full.

Part Two is the addition of Judge Lowell's son, James Lowell, and is given up to the Bankruptcy Act of 1898. The Act is considered section by section—the text of each section being followed by a commentary on the interpretation of its various words and clauses, based on the decisions under this act, and those under former acts. The appendix contains the text of all the Federal Bankruptcy Acts and the general orders and forms under the present act. The index is carefully prepared.

**The Civil Liability for Personal Injuries Arising Out of Negligence. By Henry F. Buswell. Second Edition. Sheep, pp. 545. Little, Brown & Co., Boston, 1899.**

With the exception of questions of evidence perhaps the subtlest legal distinctions of the present are found in questions involving negligence. The subject has always been marked by indefiniteness and the exceeding difficulty of confining its principles within rules of actual determinative value. Moreover, certain decisions may truly be claimed to still be in a chaotic condition, particularly that relating to contributory negligence. The obstacles in finding a satisfactory definition for a tort becomes small in seeking to define contributory negligence. This has been of great influence with Mr. Buswell, and he has given, therefore, the most painstaking attention to injuries arising from negligence as modified by the relation of employer and employee. This relation affords the widest opportunity for the claim of contributory negligence. Nothing but praise can be given to the book as a text-book, for it is exceedingly well arranged, statutory liabilities being most strenuously distinguished from common-law liability. Such a separation has now become of vital importance, because of the far-reaching enlargement of the narrow common-law rules of liability. Only one suggestion could be made, and that would be that disputed or doubtful point should be given



notice in the text, and not in most cases only considered in the notes. Settled principles need but enunciation, while doubtful doctrines need careful discussion in prominent positions. The book is of especial value, as the most recent publication of this kind and has been termed with accuracy a "modern model law book."

Mr. Buswell's previous books on the same and kindred topics have proved him a writer of high authority.

**Forms of Pleading in Actions for Legal or Equitable Relief.** Prepared with especial reference to the Code of Procedure of the various States, and adapted to the present practice in many Common Law States. By Austin Abbott, LL.D. Completed for publication after his decease by Carlos C. Alden, LL.M., Professor of Pleading in the Law Department of the New York University. Vol. II, pp. 1053. Baker, Voorhis & Co., New York, 1899.

We are in receipt of the second volume of Mr. Abbott's scholarly work. It stands now as an exceedingly comprehensive book of reference, useful not only to pleaders under the various codes, but in many common-law States. Its possession will be of the utmost value to those whose pleading is not restricted to specific lines, and to all who may care to save themselves from much anxiety and possible error, by a reference to such authority as Mr. Abbott has long been on this subject.

# YALE LAW JOURNAL

---

Vol. IX.

FEBRUARY, 1900.

No. 4

---

## THE BEGINNING OF A WAR.

In land warfare, actual conflict between states must involve the invasion of one of them. There is thus the crossing of a boundary, the use of force within a foreign jurisdiction, to mark the changed relations and to date them from.

But the high seas are subject to no state's sovereignty. Upon their levels lie no boundaries to be crossed; within their confines, no status of occupation to be defined.

The early events in the wars of naval powers, therefore, are likely to involve violence done to enemy's property, rather than violence done to enemy's territory and jurisdiction. It becomes important, when captures so made are to be substantiated, to determine the exact moment at which war legally begins. For upon this question of date may depend the legality of a capture. In both our own war with Spain and in the Japanese war with China this point was of importance, though as it proved, there were other considerations in the early captures which were paramount. On the other hand, in the Boer war now in progress, waged solely on land, the question of date is entirely a question of fact, and not of construction or declaration.

If the old fashioned declaration of war, before striking a blow, were still *de rigueur*, there could be no difficulty. There is, however, a general agreement amongst the text writers, in which the prize courts share, that though a formal declaration of war is good form, it is not in any sense essential to the beginning of legal warfare. (The *Eliza Ann*, 1 Dods. 244), (The *Amy Warwick*, 2 Sprague 123.) By declaration is meant the announcement of hostilities to the object of them, not the customary notice to the belligerent's own subjects or to the neutral. Let us dwell upon this

distinction for a moment. When a state goes to war it involves the trade of a portion of its subjects in certain risks and lays upon it certain disabilities. The risks are of capture as enemy's property. The disabilities are suspension of trade with an enemy; dissolution of partnership and other contracts with him; inability to collect debts due from him, and such like.

In order to protect its subjects from such damage incurred through ignorance, the state announces the change of relations to them, either by specific proclamation or through such legislative action as will furnish constructive notice. Thus in the United States, where Congress, not the President, has the right to declare war, a joint resolution, approved by the President, declaring the existence of war is notice enough.

So, too, notice of the new condition of things is given to the neutral. This will usually state the rules of maritime warfare, which are to govern. Thus, at the outbreak of our recent war with Spain, President McKinley announced that the neutral flag should cover enemy's goods; that the enemy's flag should *not* make neutral goods under it liable to confiscation; that blockades to be binding must be effective; that the United States would not employ privateers, and that mail steamers would not be interfered with, except upon clear suspicion of their having violated the law of contraband and a blockade.

The manifesto to the neutral also commonly states the cause of war from that belligerent's standpoint, justifies his action and throws the blame for this interference with neutral trade upon his opponent. Until this official notice of war reaches the neutral, his obligation to respect the belligerent's war rights does not become operative. And this is fair, for so serious an interruption of the neutral's trade requires justification, wide notoriety and exact definition of its scope and character. We thus reach the recognized rule that belligerent rights date from the outbreak of war, while neutral duties date from the official notification of it. This notification is a governmental act, officially dated, constructively known after a certain lapse of time to all shippers and carriers. Moreover, neutral ships are allowed by custom a certain number of days to unload and clear from ports under blockade in which they chanced to lie. All uncertainties of date, then, relate to the beginnings of war as affecting the belligerent, not as affecting the neutral.

To return now to the question of a declaration.

Not only is it not essential to a lawful war, but even when made it does not necessarily set the date of its commencement. Snow's Manual for our Naval War College (p. 79, 2d ed.) states this in so

many words: "When there is no declaration, war dates from the first act of hostilities, and even if there should be a subsequent declaration, the beginning of hostilities still remains the date of the beginning of the war." So also Hall (*Internal Law*, 2d ed., p. 349). "If the above views are correct, the moment at which war begins is fixed as between belligerents by direct notice given by one to the other, when such notice is given before any acts of hostility are done, and when notice is not given, by the commission of the first act of hostility on the part of the belligerent who takes the initiative." And Owen, in his "Declaration of War," says, p. 12, "War having once been commenced, a formal declaration to the enemy can, it would seem, be formulated and communicated at leisure, if it so please the aggressor," citing the fact that "in 1877 the Russian declaration of war against Turkey was preceded by some hours by the entry of the Russian forces into Turkey." A similar priority of armed conflict to legal declaration occurred in our own war with Mexico, the battles of Palo Alto and Resaca de la Palma having been fought before Congress recognized by Act a state of war as existing, and many similar instances can be found, as in the late war between China and Japan.

It is the fact of violence, then, and not the declaration of a status, upon which we must really fix our eyes, if we would ask when war begins. And this introduces the main inquiry of this article. Of what nature must that act of violence be which, so to speak, originates a war, which is paramount in the eye of the law to an announcement by proper authority that war began on a certain date?

Here we are on uncertain ground.

There must naturally be some official warrant to a ship of war for aggressive action, or a clear case of self-defense, else its making war may be disavowed. Even with this, as Professor Takahashi has said, preparation for war is not war *de facto* itself. It is also true that there may be acts of violence, yet no war, as was the case between the United States and France at the end of the last century. But with conflict a fact, and legislative or executive sanction not wanting, the moment of conflict is the date from which war is reckoned, not the moment of sanction or the moment when orders for violent action were given. The question thus relates not so much to the date of a certain event as to the character of that event. If two ships of war meet and fight, and their action is not disavowed, that constitutes the beginning of war. But suppose that one of these ships of war meets a mere merchantman of the other nationality, can the war be begun by her capture as legitimately as by battle with the armed ship?

The argument certainly sounds rather paradoxical. The capture is valid because war exists; war exists because the capture has taken place. And yet so far as reason goes, this is a logical position. For preying upon enemy's commerce, as the law is, is as legitimate a part of warfare as the capture of his ships of war would be. Moreover, the attack on his property cannot open and legitimate the war, cannot make subsequent capture legal, and yet itself be illegal. But logic is not all, or even the major part, of a rule in International Law. The common law-bred mind wants precedent as well. What warrant is there for believing that hostilities can legally be opened by the seizure of private property? This point was raised, though not settled, in the well known Kow-Shing affair, at the outbreak of the recent Chinese war, the issue turning on another fact. The Kow-Shing was an English steamer hired to convey troops to Corea, by the Chinese government, and actually having 1,100 officers and soldiers on board, with much military material. She was sighted at 8.30 a. m., July 25, 1894, by the Japanese fleet. One of the ships composing it hove the Kow-Shing to, inspected her loading and ordered that she should follow her. The British captain agreed, but the Chinese on board threatened his life if he did so, and he signalled this fact to the Naniwa. After a considerable interval, during which the Japanese ordered him to leave his ship, which the Chinese prevented his doing, Captain Galsworthy and several others jumped overboard, their passengers firing upon them in the water. Then the Naniwa put a shot into the Kow-Shing and the latter went down. If war had begun, the merchantman, carrying Chinese troops, was a Chinese transport, no matter what her nationality might be, and as was afterwards made clear, war had begun that same morning at an earlier hour, by combat between this same Japanese fleet and two Chinese men-of-war. But this did not at once appear and the question was argued in England on other grounds. Could the attack on the Kow-Shing in itself begin the war, thus making her an enemy's transport, and legalizing the destruction of neutral property thus impressed with a hostile character? Two English jurists expressed themselves on this point. Professor Holland wrote to the *Times*: "If the visiting and eventual sinking of the Kow-Shing occurred in time of peace, or in time of war before she had notice that war had broken out, a gross outrage has taken place. But the facts are otherwise. In the first place a state of war existed. It is trite knowledge, and has been over and over affirmed by courts, both English and American, that a war may legally commence with a hostile act on one side, not preceded by declaration. \* \* \* Whether or not hostilities

had previously occurred upon the mainland, I hold that the acts of the Japanese commander in boarding the Kow-Shing and threatening her with violence in case of disobedience to his orders, were acts of war.

In the second place, the Kow-Shing had notice of the existence of a war, at any rate, from the moment when she received the orders of the Japanese commander."

This opinion, reiterated after the author was in full possession of the facts, would seem to consider the stoppage of the transport a lawful beginning of the war.

But another writer, Professor Wheatlake, does not go so far as this. "It is true," he wrote, also to the *London Times*, "that the commencement of war *de facto* is only valid in International Law as between the parties to the war so commenced, neutrals being entitled to notice before they can be made liable to the peculiar responsibilities which a state of war imposes on them. But the Kow-Shing was not acting as a neutral breaking a blockade or carrying contraband of war. She was a transport in Chinese service, and therefore a belligerent, if China was a belligerent. But the Japanese could not make the Kow-Shing a belligerent by attacking her," and he argues that the attack could be justified only on the ground of military necessity, or the occurrence of acts of hostility prior to it. On the point under inquiry, then, these two opinions differ absolutely. They are cited in an interesting work on those questions in International Law which arose during the Chino-Japanese war of 1894, by Professor Takahashi, who was himself detailed to accompany the fleet as adviser in such matters. He does not attempt to decide between these views, having safer ground to stand on, because there was proof of an earlier conflict. "Whether a war can be commenced by an act of search or whether it must be commenced beforehand by some acts of hostility committed elsewhere, is a difficult legal question, and I think there is no necessity to decide it in the present case."

Upon this point, it is proper to make this comment: that every "act of hostility committed elsewhere" on sea except a collision between ships of war under their own flags, involves visitation and search as a preliminary to capture; that this in turn would require some earlier "act of hostility elsewhere" to legalize it; and that thus we are brought face to face with something very like absurdity. It is like the jam yesterday, and jam to-morrow, but never jam to-day, which tried Alice so solely.

We turn now to the early hours of our own war with Spain. The official steps leading up to it were, first, the joint resolution of

Congress of April 20, 1898, approved by the President on the same date; second, the order of the Navy Department to blockade certain parts of Cuba, issued on April 21; third, the necessary proclamation of this blockade by the President on April 22; fourth, an act of Congress, approved April 25, declaring the existence of war, "and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain." Lastly, on April 26, the President gave notice of the rules which should govern the navy in the matter of capture.

The first shot fired in the war was across the bows of the Spanish steamer Buena Ventura, off the Florida coast, on April 22. The first action in the war was the bombardment of the defences of Matanzas on April 27. Which of these various events, executive, legislative or military, began the war?

Clearly we cannot date it from the joint resolution of Congress declaring the people of Cuba of right independent, and warning Spain to withdraw her forces from the island, because if Spain had complied that would have been the end of it. An ultimatum is not war, though it usually leads to it.

Nor were the order of the Navy Department establishing blockade, and the President's proclamation legalizing it by the proper notification, events from which we can date, because, although war measures, they were war measures in preparation, not in being, and could not be made effective until some hours or perhaps days after their issue. In point of fact the Buena Ventura was captured before blockade was a fact.

There remains to be considered the declaration of war issued on the 25th of April, and in terms making the 21st the first day of war. For many purposes this date would be held authoritative, and yet it may not be conclusive. Suppose that Spain also issued a declaration or its equivalent, and on a different date from that of the United States, which should govern? She did in fact, on the 23d of April, declare her treaties with us terminated by the "state of war existing." We are thus thrown back on the rule noticed earlier in this article, that even if subsequently a declaration of war be made, nevertheless war dates from the beginning of hostilities, and ask whether the capture of the Buena Ventura may be included in this category. This prize case, condemned by the District Judge of the Southern District of Florida, has recently been reviewed in the Supreme Court of the United States. The decision of the lower Court was reversed—three justices dissenting—but on this ground. On April 26 President McKinley had issued a proclamation exempting from seizure Spanish merchantmen which were not en-

gaged in the naval service of their country in any way, and which were in any United States ports or prosecuting a voyage from any such ports, the exemption to run until the 21st day of May. In point of fact the Buena Ventura had commenced her voyage from a United States port upon April 19, seven days before the exemption granted by the President was proclaimed. Did this exemption date from its issue only, or should it be held to cover ships sailing under the same conditions earlier than the proclamation. Here the Court put a liberal construction upon the President's language and probable intention. To quote the decision itself, the Court put upon the words of the proclamation "the most liberal and extensive interpretation of which they are capable," believing that the vessel was of a "class which this Government has always desired to treat with great liberality." Its arguments was as follows: "The omission of any date in this clause (fourth clause of President's proclamation) upon which the vessel must be in a port of the United States, and prior to which the exemption would not be allowed, is certainly very strong evidence that such a date was not material, so long as the loading and departure from our ports were accomplished before the expiration of May 21. It is also evident from the language used that the material concern was to fix a time in the future, prior to the expiration of which vessels of the character named might sail from our ports and be exempt from capture. The particular time at which the loading of cargoes and sailing from our ports should be accomplished was obviously unimportant, provided it was prior to the time specified." One further sentence is necessary to my narrative. "Deciding as we do in regard to the fourth clause, it becomes unnecessary to examine the other grounds for a reversal discussed at the bar." This is a pity, for one of these other grounds exactly touches the subject of our inquiry. The counsel for the Buena Ventura in their very able brief had argued that whether the capture was in violation of the President's proclamation or not, it must be held illegal because at the moment of its occurrence no war existed. "The capture was premature, and out of accord with recent practice. At the time the Buena Ventura was seized there had been no declaration of war, nor had any acts of violence occurred between the armed or naval forces of the different nations. No hostilities, which in International Law are deemed to constitute a beginning of war without a declaration, had taken place. Without a declaration, it seems that war does not begin until some blow is struck or some shot fired. \* \* \* Nothing was done by the United States necessarily constituting an act of war, at least until the fleet reached the Cuban



shore and actually established a blockade. It was while the fleet was leaving the Key West harbor, bound for the blockading stations, that this capture was made. \* \* \* It was not in accordance with international usage to make the Buena Ventura hostile by firing upon her."

Upon this argument, unfortunately for our purposes, the Supreme Court does not comment.

In refusing to saddle costs upon the claimants, it *does* use this language, however: "In this case, but for the proclamation of April 26, the ship would have been liable to seizure and condemnation as enemy property." But even if this were true, the Court does not declare whether in its judgment, barring the proclamation, the ship would have been good prize because war was begun by its visitation, search and seizure, or because war was declared to date from the day before its seizure by a subsequent Act of Congress.

So that upon the point raised in this inquiry, we are still in the dark, so far as any judicial practice goes. Perhaps we may go, however, as far as this. If no exemption is ordered, and no declaration of war is issued, and before any conflict of arms has taken place, though this presently occurs and a war ensues, the visitation of an enemy merchant ship involving notice to her of the commencement of hostilities, is such an act of violence as to make her condemnation as prize, on the ground that war had thereby been begun, very probable.

THEODORE S. WOOLSEY.

## THE DATE FOR THE OPENING OF THE TWENTIETH CENTURY.

The closing years of every century have brought up a discussion as to when it was to end. It was decidedly a burning question as A. D. 1000 was approached, for a large part of the world thought that the termination of the first millenium of the Christian era was to bring in the "Last Day," and no one breathed quite freely until the eleventh century had fairly opened.

The point upon which the difference of opinion arises would seem at first sight to present no difficulty. What can the term "Christian Era" mean but the era beginning with the birth of Christ? If this be its true signification, then the first year of the first century would naturally end three hundred and sixty-four days after the date of his birth. At that time he reached the age of one year, and on the next day he began the second year of his life. Consequently, if we are to pursue the received usage as respects the statement of a man's age, the first day of the year A. D. 1 would be a year after Christ's birth, and that event would be given as having occurred on the first day of the year ( $1-1=0$ ) zero. A man must live through his twenty-first year before he is 21. So Christ must have lived through his first year before he was one, and if this was the first *Annus Domini*, it would seem to be a departure from the customary modes of reckoning time to call it the year 1.

But the Christian era does not begin with the birth of Christ.

It was first invented more than five-hundred years after his death. Dionysius Exiguus, the man who proposed this new way of computing time, was a Scythian monk, who became a Roman abbot. The prevailing mode previously had been that established by Julius Cæsar when he reformed the calendar in 708 A. U. C. The year following that (709 A. U. C.) was made to commence on the Kalends of January, that is, on January first.

Now the traditions of the church had placed the day of Christ's birth on December 25, and that of his conception (styled Lady-day, being the date of the annunciation or of the incarnation) on March 25. Dionysius proposed to make the new era begin on March 25.

In this he was only partially successful. The civil year, recognized by law, in many countries of Christendom, was long the year of

the incarnation.<sup>1</sup> The Roman church followed this in dating the papal bulls, although the civil officers at Rome under the popes dated their acts as of a year comencing on Christmas, *a nativitate*.<sup>2</sup> The general ecclesiastical year, however, began, and in the Roman Catholic and the Anglican church still begins, on the first Sunday of Advent. On the other hand, historians commonly adhered to the Julian calendar in treating the year as beginning January first. France in 1563 changed her civil year to correspond to this historical usage. Scotland followed in 1600; Holland, Protestant Germany and Russia a hundred years later; and England not until 1751. Indeed, in England the beginning of the financial year still remains as it was before 1751, and the Chancellor of the Exchequer makes up his estimates from one Lady-day to another, the red tape of the Treasury officials not having even been untied so far as to abandon the Gregorian calendar for the date of that festival, which is counted as occurring on April 5, that being, or having been in 1582 (when Gregory XIII led the way in rectifying the Julian calendar), March 25 O. S.<sup>3</sup>

Dionysius then succeeded in forcing his new era into universal acceptance, in so far as to describe all events subsequent to the year in which Christ was born as of the Christian era. He failed in making the era begin with the incarnation, or the nativity.

In adopting his method of computation to use, therefore, it was necessary to conform it to the Julian calendar, so far as to put Christmas day in one of the years ascertained by that calendar, that is, in a year beginning on January first. The only year which it was possible thus to adopt was the year 1. Either the incarnation or the nativity, or both, certainly occurred during the course of the first year of the Christian Era. As neither of these events was ever assigned to the month of January, each must have occurred in a Julian year which began on the first day of January last preceding.

Hence we say that Christ was born on Christmas day A. D. 1, and became one year old on December 25, A. D. 2. The first century of our era therefore began, not on December 25 (nor on March 25), A. D. 0, but on January 1, A. D. 1. And so the twentieth century will begin January 1, A. D. 1901, and not before.

---

<sup>1</sup> It was generally used in dating the codes of the dark ages. Thus the "*Capitulaire Aquisgranense*" is dated "*Anno Dominica incarnationis DCCLXXXIX, Indictione XII, anno XXI regni nostri. Corp. Jur. Germanic.*" of Heineccius, 574.

<sup>2</sup> Merlin, *Répertoire de Jurisprudence. Année*, 417.

<sup>3</sup> Chambers' Book of Days, I, 4.

Astronomers, in reckoning time, prefer to name the year preceding A. D. 1 as A. D. 0, but they do not insist on other people's doing so. One of the greatest of them, Lalande, in 1800, pronounced in favor of the position that the nineteenth century as the world generally understood the meaning of words, began on January 1, 1801.<sup>4</sup>

Of course, in fact, we have been for some time living in the twentieth century, as Dionysius, in reckoning backwards, miscalculated the date of Christ's birth, which is now generally supposed to have occurred in April, B. C. 4.

---

<sup>4</sup> Annual Register for 1800. Chronicle, p. 6.

SIMEON E. BALDWIN.

## THE CONSTITUTIONAL REQUIREMENT OF UNIFORMITY IN DUTIES, IMPOSTS AND EXCISES.

Does the Constitution require that the duties, imposts and excises laid and collected by authority of the Congress in the territories, whether organized or unorganized, shall be uniform with those laid and collected within the States constituting the Union?

The Ways and Means Committee of the House of Representatives has recently appointed a committee of five to report the authorities and the law upon this question. If the United States is to continue to hold the islands recently wrested from Spain, and, when opportunity offers, to acquire other lands where the political and industrial conditions differ widely from those prevailing in the States, this question of power is one of the greatest moment.

Yet the question is one of constitutional construction simply. For constitutional amendment is so difficult as to be improbable; and the doctrine that the Constitution is the measure of the power of the national government is the foundation of our system of constitutional law. But it is to be hoped that the executive and legislative branches of the government, as well as the judicial, not forgetting that it is a vital clause in a constitution of government of which they are seeking the meaning, will give it a broad and comprehensive interpretation to the end that the national government may continue equal to the tasks imposed upon it.

The general principle is now well settled by legislative and executive action and judicial decision that—to quote the language of Mr. Justice Gray in *Shively v. Bowlby*, 152 U. S. 1, 48,—“the United States, having rightfully acquired the territories, and being “the only government which can impose laws upon them, have the “entire dominion and sovereignty, national and municipal, federal “and State, over all the territories, so long as they remain in a territorial condition.” This principle is more elaborately stated by Mr. Justice Bradley, speaking for the court in the case of *Mormon Church v. United States*, 136 U. S. 1, 42, as follows:

“The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory and other property belonging to the United

States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory, other than the territory northwest of the Ohio river (which belonged to the United States at the adoption of the Constitution), is derived from the treaty-making power and the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty and by cession, is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government, in its diplomatic negotiations, had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No State of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident."

This full and plenary power or sovereignty of Congress includes the power to create territorial governments with such delegated power of local self-government as Congress may deem it proper to confer, and as well the power to legislate directly on all matters pertaining to the general and local government of the territories. *National Bank v. County of Yankton*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 114 U. S. 15; *Utter v. Franklin*, 172 U. S. 416.

What express and implied limitations there are upon the sovereign power of the United States to govern the territories, it is difficult to say. For example, it has been held, though somewhat hesitatingly, that the right to jury trial is secured to the people of the territories and of the District of Columbia. *Callan v. Wilson*, 127 U. S. 540; *American Publishing Company v. Fisher*, 166 U. S. 464; *Springville v. Thomas*, 166 U. S. 707.

But it has been held that those provisions of Article III, relating to the constitution and jurisdiction of the Federal courts and the tenure of office of the Federal judges, do not operate as limitations upon the power of Congress to create, directly or indirectly, a territorial judiciary. *American Insurance Co. v. Canter*, 1 Peters 511; *McAllister v. United States*, 141 U. S. 174.

Hon. Simeon E. Baldwin, in his paper on "The People of the United States," *YALE LAW JOURNAL*, Volume VIII, p 159, has made an exceedingly valuable contribution to the learning upon this subject. His opinion is that many of the Constitutional limitations were created solely for the benefit of the persons who are citizens of the United States and of the States constituting the Union, while other limitations are for the protection of all persons who are subject to the jurisdiction of the United States regardless of their citizenship. Article X of the Amendments provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." But no power of government is by the Constitution reserved to the people of the territories; and neither the States nor the people thereof can exercise any power of government in the territories save through the agency of the Union. In view of the decisions it is reasonably certain that those constitutional limitations upon the powers of Congress which are designed to secure the civil rights of persons, as such, are operative wherever the power itself may be exercised, whether in the States or the territories.

In defining the taxing power of the United States, the framers of the Constitution were chiefly concerned with the proper definition of the relations to subsist between the States and the United States. The powers which Congress was to exercise in the States were carefully enumerated and defined. But by the same instrument Congress was given the power to exercise exclusive legislation over the seat of the national government; and according to settled principles, its power over the territories is not less extensive.

The provisions of the Constitution relating to taxation and to the regulation of commerce by Congress, must be construed together. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. \* \* \* the Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts, and provide for the common defense, and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States; \* \* \* to regulate commerce with foreign nations and among the several States, and with the Indian tribes; \* \* \* no capitation, nor other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to,

or from, one State, be obliged to enter, clear, or pay duties in another."

The operation of the clauses relating to direct taxation and to the apportionment thereof, is expressly limited to the States. The express power to lay and collect taxes of the direct kind and of the indirect, is granted by the same clause; and this clause is contained in a section which defines and enumerates specially the powers which Congress may exercise within the States. It is impossible that the definition and enumeration of powers in this section were intended to derogate at all from the power expressly granted to Congress "to exercise exclusive legislation in all cases whatsoever, over such district not exceeding ten miles square as may by cession of particular States and the acceptance of Congress, become the seat of government of the United States," \* \* \* and to "make all needful rules and regulations respecting the territory and other property belonging to the United States." This conclusion is strengthened by the fact that the purpose for which Congress is to exercise the power of taxation granted to it by the first clause of Section 8 of Article I, is "to pay the debts, and provide for the common defense and general welfare of the United States." The power to levy taxes for such purposes does not include the power to lay and collect taxes to defray the expenses of local government in the territories and in the District of Columbia. Yet, from the foundation of the government to the present time, the governments of the territories and the District of Columbia in the exercise of powers delegated by Congress—powers which Congress could as well have exercised directly—have laid and collected direct taxes and excises of various kinds in order to defray the expense of territorial and district government. Numerous cases involving the validity of particular taxes levied by territorial and district governments have gone to the Supreme Court of the United States, some of the more recent cases being, *Maricopa & P. R. Co. v. Arizona*, 156 U. S. 347; *McHenry v. Alford*, 168 U. S. 651; *Thomas v. Gay*, 169 U. S. 264; *Wagoner v. Evans*, 170 U. S. 588. But it has not occurred either to the Bench or to the Bar to contest the validity of such taxes, because the direct taxes were not laid by the rule of apportionment, or the indirect by the rule of uniformity prescribed by the Constitution for the guidance of Congress in exercising its power of taxation within the States.

To construe the Constitution as requiring duties, imposts and excises laid and collected in the territories to be uniform with those laid and collected in the States, is to deny to Congress and to the territorial legislatures the power to impose license taxes and any



other kind of excises within the territories without imposing the like license tax upon the people of the United States, and, logically, the power to impose direct taxes upon persons and property in the territories, unless it be done as a part of a general levy by apportionment among the States. The validity of Sections 1924 and 1925 of the United States Revised Statutes, which require that all property in the territories shall be assessed and taxed in proportion to its value, has never been questioned. The settled and unquestioned usage and practice of government, except in the case of duties upon imports, is therefore opposed to the view that the first clause of Section 8 has any application to the territories.

The fact that the industrial conditions prevailing in the territories are similar to those in the States, and the resulting facts that Congress has imposed no tax upon commerce among the States, and has imposed the same duties upon foreign goods imported into the territories as upon the like goods imported into the States, have given rise to an ill-defined belief that there is something in the Constitution which restrains Congress from imposing taxes upon commerce between the several States and between the States and territories, and requires the duties upon goods imported into territories to be uniform with those imposed upon the like goods imported into the States. It will be conceded by every one that Congress may impose license taxes or excises within the territories without imposing at the same time similar license taxes and excises within the States, while it is stoutly contended that duties upon imports must be uniform throughout the States and territories. But it is to be observed that, if the Constitution requires duties upon imports to be uniform, it must also require imposts and excises to be uniform. The unfounded notion that no taxes can be imposed by Congress upon commerce between the States and territories is largely responsible for this. But there is nothing in the Constitution which restrains Congress from laying duties upon goods imported into the States from the Philippine Islands or other territories. This position is supported by several decisions which uphold the right of Congress to prohibit the importation, manufacture and sale of intoxicating liquors in Alaska. *United States v. Nelson*, 29 Fed. Rep. 202; *Nelson v. United States*, 30 Fed. Rep. 112; *Endleman v. United States*, 86 Fed. Rep. 456. For the power to prohibit the importation of any commodity into a territory includes the power to require the payment of a duty as a condition to the granting of permission to import and sell it.

There are two cases which are often cited in support of the opposing view. The first is *Cross v. Harrison*, 16 How. 164, wherein

it was decided that the plaintiff below, having paid duties upon imports to the officers of the provisional government in California prior to its admission into the Union as a State, the payment having been made without real coercion, and Congress having adopted and ratified all the acts of the provisional government, could not recover the money which he had paid. This case presented no question concerning the Constitutional power of Congress, but one of statutory construction only. The second case is *Loughborough v. Blake*, 5 Wheat. 317, wherein it is decided that Congress possesses, under the Constitution, the power to lay and collect direct taxes within the District of Columbia in proportion to the census directed to be taken by the Constitution. But it is conceded by the court that Congress may lawfully impose direct taxes in the District for District purposes without regard to the rule of apportionment, and that Congress is under no constitutional necessity to impose direct taxes by the rule of apportionment upon the District of Columbia, or upon the territories, even though such a direct tax is laid upon the States. Mr. Chief Justice Marshall, delivering the opinion of the court, expresses the opinion that the term "United States," as used in the first clause of Section 8 of Article I of the Constitution, includes both States and territories, and that "it is not less necessary on the principles of our Constitution that uniformity in the imposition of imposts, duties and excises should be observed in the one than in the other." This dictum of the great chief justice is entitled to great consideration; but if we adopt the logic of his opinion, we would arrive at this conclusion, viz.: that Congress has the constitutional power to levy duties, imposts and excises in the territories for local purposes without regard to the so-called rule of uniformity, and that it is not constitutionally necessary for Congress to levy any duties, imposts and excises in the territories for national purposes, even though duties, imposts and excises be levied within the States. But this dictum is very unsatisfactory and entirely inconsistent with the general principles of constitutional law, which have been so carefully considered and elaborated in the decisions which I have already cited. I am convinced that the term "United States," as employed in the first clause of Section 8 of Article I, must be understood as referring only to the constituent members of the Union. This is clearly the sense in which the term "United States" is used in the preamble, in Sections 1, 2, 3, 6 and 10 of Article I, and in Section 1 of Article III.

WILLIAM BRADFORD BOSLEY.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,  
ROBERT H. GOULD,  
LESLIE E. HUBBARD,

WARREN B. JOHNSON,  
ARCHIBALD W. POWELL,  
GEORGE ZAHM.

## Associate Editors:

M. TOSCAN BENNETT,  
JOHN HILLARD,  
WILLIAM H. JACKSON,  
CORNELIUS P. KITCHEL,

GEORGE A. MARVIN,  
ROBERT L. MUNGER,  
HENRY H. TOWNSEND,  
THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

Under the method in use up to the present time, the issue of the JOURNAL which has appeared at the close of the month has been dated as of the month just ending. The disadvantages of this system have become so obvious that a change has been effected. The present number is dated February instead of January, there being no issue of that date. There will be no change at present in the number of issues to a volume or the time of appearance. The ninth and last number this year will be dated July instead of June as heretofore, and the first number next fall will be dated November instead of October.

---

ANTI-TRUST LAW—POWER OF CONGRESS TO RESTRICT CONTRACTS IN  
RESTRAINT OF INTERSTATE COMMERCE—ADDYSTON PIPE AND  
STEEL CO. V. U. S., 20 SUP. CT. REP. 96.

This is one of the most interesting and valuable of the recent decisions of the Supreme Court. The opinion by Justice Peckham is very lucid in its exposition of the principles upon which a contract restraining competition in bidding for contracts to furnish goods, to be manufactured by the successful bidder, is a contract in restraint of trade and not such a monopoly of manufacture merely

as is held legal in the case of *U. S. v. E. C. Knight Co.*, 156 U. S. 1. Of more especial merit, however, is the discussion of the proposition that the power given by the Constitution to Congress to regulate interstate commerce, was not intended as "a general power to interfere with or prohibit private contracts between citizens, even though such contracts have interstate commerce for their object and result in a direct and substantial obstruction to or regulation of that commerce." This contention is based on the grounds that the power was vested in Congress so as to insure uniformity of regulation against conflicting and discriminating state legislation, and that the constitutional guaranty of the liberty of private contract is a limitation on the power of Congress to regulate commerce. In answer the court holds that the power of Congress to legislate is given as a limitation on the right of contract; that the interference with interstate commerce by contract may be as far-reaching as any by state legislation, and if unrestrained would result in the regulation of a subject which has been given over to Congress; and that if such power over contracts does not vest in Congress it must reside either in the legislatures or courts of the states, which could thereby exercise indirectly a conflicting and discriminating control over interstate commerce.

The decision of this point is not based on authority, for the question is a somewhat novel one; but it stands on sound principles. The power to regulate a subject unquestionably must include the power to regulate the right of contracts relating to that subject. The power to regulate interstate commerce is vested in Congress and the anti-trust law of 1890 is a valid exercise of that power.

PRIVILEGED COMMUNICATIONS—RIGHT OF ATTORNEY TO COMMENT  
UPON FAILURE TO CALL FAMILY PHYSICIAN.

The common law limited very closely the doctrine of privilege to witnesses or communications. Indeed they were not really privileges, but extensions of the rule that a party to a suit was incompetent to testify for himself. The wife could not testify, being one with the husband; the attorney, being agent and representative of the party. With the relaxation of the rule on which they were based they were modified and became pure privileges. But the law refused to physicians this benefit. They could be compelled to go upon the stand, and, once there, to disclose confidential professional communications. *Duchess of Kingston's Case*, 20 How. St. Trials 572.

New York was the first State to prohibit by statute "any doctor of physic" from disclosing "any information acquired in attending a patient in a professional capacity," but allowing the patient to waive

the privilege. Such is practically the language of the twenty states that have passed similar laws;—including Indiana. *Gartside v. Connecticut Mutual Life Insurance Company*, 76 Mo. 446-Note. A conflict exists as to whether the failure to call as a witness a person to whom the privilege extends may be commented upon by the opposing attorney as raising a presumption that his evidence would be against the interest of the party failing to call. The Master of the Rolls in *Wentworth v. Lloyd*, 10 H. L. 589, endeavored to apply the rule of *Armory v. Delmaire*, Strange 505, but the Lords reversed him on the ground that the exclusion of such evidence was for the general interest of the community. And in *Freeman v. Fogg*, 82 Me. 408, it was held proper for the court to refuse to allow comment upon the fact that the attorney who had drawn the contract upon which the plaintiff based her claim and the terms of which were in dispute, had not been called as a witness. Or upon the failure of the accused in a criminal trial to testify for himself. *Wilson v. United States*, 149 U. S. 60. Or failure to call his wife. *Graves v. United States*, 150 U. S. 118. But Mr. Justice Brown based his decision on the fact that the wife was not a competent witness and that the accused could not call her.

Here lies a partial standard by which to measure this right of comment by counsel and one which will reconcile the opinions in *City of Warsaw v. Fisher*, 55 N. E. 42, the case under review, where it was held that, in an action for damages resulting from personal injuries, counsel for defendant may properly comment upon plaintiff's failure to call as a witness his attending physician. He was not incompetent as a witness and *the plaintiff was basing his action upon matters about which the testimony of this physician could fairly be presumed to be the best evidence obtainable*. It was within the plaintiff's power and his only to call him as a witness. The rule is that, if a party has it peculiarly within his power to produce a witness, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable. 1 *Starkie on Evidence* 54. Presumptions are auxiliary evidence and may therefore be commented upon by counsel.

But it is argued that this is to change a privilege to a snare and practically defeat a statute by a rule of practice. • Not so. The purpose of the statute is to inspire confidence between the patient and physician. Will any patient be deterred from stating his symptoms by the knowledge of this rule? To extend an absolute privilege without right of comment to cases of this kind would be to encourage baseless litigation and promote damage suits now altogether too frequent and slightly grounded.

SUITS AGAINST PUBLIC OFFICERS FOR OFFICIAL MISCONDUCT—LAW  
GIVING RIGHT TO BE IDEMNIFIED BY MUNICIPALITY UNCONSTITUTIONAL.

In the recent case of *In re Jenson*, 60 N. Y. Supp. 933, the Supreme Court of New York declares the Ahern Act to be unconstitutional because it provides retrospectively for alleged claims against the municipality and authorizes taxation for purposes not public in their nature. This act in substance provided for the defrayal of expenses of legal proceedings paid or incurred by certain officers and officials of the state and of the cities and counties thereof, and enabling them to obtain a reimbursement, either from the city, county or state treasury, as the case may be, for reasonable counsel fees and expenses paid or incurred in any trial or proceeding to remove from office, or any prosecution for a crime alleged to have been committed in the performance of official duties, or in connection therewith, in which trial or proceeding the prosecuted officer had been successful. The act also provided for the levying of a tax to meet such reimbursements.

It has long since been well settled that the taxing power can be exercised only to raise money for a purpose that in some sense at least can be said to be public. *Loan Assn. v. Topeka*, 20 Wal. 655. In the present case, the court in deciding that the levy of a tax to meet such reimbursements was not one for a public purpose, takes into consideration the novelty of the idea and the fact that courts must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal, and concludes that never yet has a purpose of this character been included among the objects for which taxes have been customarily levied.

It has never been deemed essential that claims against the state or municipality bear a legal character, but the same, if supported by a moral obligation and founded in justice, where the power exists to create them but the proper statutory proceedings are not strictly pursued or for any reason are informal or defective, may be legalized by the legislature, and enforced, either against the state itself or any of its political divisions, through the judicial tribunals. The justness of this proposition is obvious. But in the case under review, it is difficult, if not impossible, to find any obligation whatever, legal, equitable, or moral, on the part of the state or any of its municipalities, to make such reimbursement, and such payment would therefore be open to the objection of being a mere gratuity.

The courts have at all times been open to private individuals to recover any damages incurred by reason of a prosecution against them, whenever they are able to establish all of the elements essential to an action for malicious prosecution. Even in case of established innocence, the views which have thus far prevailed have been that he who is criminally prosecuted with apparently good cause must bear the burden of his own defense, as a part of the price he pays for the protective influences of our institutions of government. This sense of hardship has never been regarded as raising an equitable claim against the state for a reimbursement on the part of any acquitted defendant, generally in criminal cases, and it is impossible to perceive any distinction in favor of officers prosecuted for official misconduct which should give rise to a moral obligation in their case not existing in favor of non-official defendants.

The court, in the opinion handed down, makes reference to, but does not decide, the fact that it may be that purely prospective legislation announcing the intention of the state to pay such expenses incurred in future cases would be deemed expressive of a public purpose, and that the assurance thus given might be regarded as creating such an obligation as to relieve the subsequent payment from the objection that it was a mere gratuity.

VICE-PRINCIPAL—CONDUCTOR OF A FREIGHT TRAIN—NEW ENGLAND  
R. R. CO. V. CONROY, 20 SUP. CT. REP. 85.

No little confusion in the law governing the liability of a master for injuries caused by the negligence of fellow servants is cleared up by this decision, handed down in December by the United States Supreme Court. In general the rule adhered to by this court, following the current of authority in this country and England, has been that the master is not liable to the servant unless the servant whose neglect caused the injury is "one who was clothed with the control and management of a distinct department, and not a mere separate piece of work in one of the branches of service in a department." *Northern P. R. Co. v. Peterson*, 162 U. S. 346. At the same time, however, the decision in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, in which it was held that an engineer could recover from the company for the negligence of the conductor of the train, on the ground that the latter is a vice-principal, though in conflict with the doctrine upheld in other cases, has never been overruled in terms.

The court now decides that it was overruled in effect by the case of *B. & O. R. Co. v. Baugh*, 149 U. S. 368, where a fireman was not allowed to recover from the company for injuries caused by the

negligence of his engineer occupying the position of "*ad interim* conductor." The perplexity caused by these inharmonious decisions is well illustrated in the earlier stages of the present case. The trial court instructed the jury that under the rule of the Supreme Court the conductor of a freight train is a vice-principal. On appeal the judges of the Circuit Court of Appeals for the First Circuit were unable to decide the point and referred it to the Supreme Court. This court has done well in now definitively overruling the Ross case and affirming that it cannot under the ordinary conditions of railroading "hold a conductor of a freight train to be a vice-principal within any safe definition of that relation."

Justice Harlan, who concurred in the decision of the Ross case, dissents on the ground that the control of a conductor over a train is sufficient to render him a vice-principal. This view, if logically applied, would make almost any boss over a particular piece of work in a department stand in that position. The conductor of a train is under instructions from train operators and other officials and is in no wise superintendent of a department. That the master is liable for the gross negligence of a servant of superior rank is held in Ohio, Kentucky, and perhaps a few other states. But the weight of authority is strongly the other way. On principle, it would seem that the reason for the qualification to the rule of non-liability of the master for negligence of fellow servants, which is made in the case of a vice-principal, extends only to such superintendents as for all purpose relating to the control of the department and servants in it, stand in the shoes of the principal. A servant, of no matter how high grade, himself under the control of other servants, does not hold that position.

The case is a valuable one for its review of the authorities on the whole subject of the liability of master to servant.

#### CIVIL SERVICE OF CITIES—APPOINTMENTS FROM ELIGIBLE LISTS.

Since the inauguration of the civil service legislation, the question as to eligibility to appointment to public offices has often found its way into the courts. In this connection the recent case of *People et rel. Balcom v. Mosher et al.*, 61 N. Y. Supp. 452, is of some interest, in that the court interprets the provisions of the Constitution of the State of New York, relative to this question, and declares that the statute and civil service rules, passed in pursuance thereof, providing for the appointment of the person graded highest on the proper eligible list, is in conflict with the Constitution of the state.

The Constitution, Art. 5, Sec. 9, in substance provides That the appointments in the civil service of the state shall be according to



merit and fitness, ascertained so far as practicable by competitive examination. The statute and rules above cited can readily be harmonized with this section. But the Constitution, Art. 10, Sec. 2, makes a further provision that "all city, town and village officers, whose election or appointment is not provided for by this Constitution, shall be elected by the electors of such city \* \* \* or appointed by such authorities thereof, as the legislature shall designate for that purpose." This provision clearly contemplates some degree of discretion as to the personnel of the appointee. The statute and rules are therefore in conflict with this provision.

It will be found upon an examination that, prior to the adoption of the Amendments to the Constitution, which are now under consideration, the practical construction of the then existing civil service laws, requiring appointments to be made as the result of competitive examinations, was not to compel the appointment of the person standing highest upon the list, as a result of such examination, but permitted the selection of one out of a limited number of those standing highest upon the list. The object of these civil service rules was to reduce the opportunities for favoritism to the lowest point deemed possible, yet to leave some degree of discretion and responsibility for the appointment in the officer making it.

In endeavoring to ascertain the intention of the law-makers upon any given subject, the history of the times, and of the subject, and of the laws and customs in relation to it, if any existed, the proceedings of the law-makers, and the evils intended to be corrected, and the good to be accomplished, must be considered. It is a familiar rule of construction, that the framers of constitutions and statutes are presumed to have a knowledge of existing laws, and that the instruments that they frame and adopt, are framed and adopted in reference to such existing laws.

After a lengthy review of the authorities and also a short historical discussion of civil service legislation, the court comes to the conclusion that there can be no doubt that in adopting the Amendments of the Constitution, the framers intended to continue the hitherto uniform rule as to "at least a limited and restricted discretionary power," and not to compel the appointment of the one highest upon the eligible list, and thereby also deprive the appointing authority of the very essence of the power elsewhere granted.

The decision in thus reconciling these provisions of the Constitution, clearly elucidates the rigidity with which that fundamental rule of construction, namely, that in interpreting the Constitution, it is to be considered as a whole, complete in itself, and force and effect must be given to every provision contained in it, is applied.

## RECENT CASES.

**ACCIDENT INSURANCE—CONSTRUCTION OF POLICY—EFFECT OF PRIOR ADJUDICATION—FIDELITY AND CASUALTY CO. v. LOWENSTEIN**, 97 Fed. 17.—A provision in an insurance policy was as follows: "This insurance does not cover \* \* \* injuries, fatal or otherwise, resulting from poison, or anything accidentally or otherwise taken, administered, absorbed or inhaled." The holder of this policy died from accidental inhaling of gas. Previous decisions had held that such a provision did not exempt the company from liability for death of person insured. *Held*, that the court would hold the same view regardless of what it might hold if the question was *res integra* Sandborn J., dissenting.

The law is that where a provision in an insurance policy states that the company is relieved from liability for deaths from poison it refers only to cases where the poison is purposely taken, not to cases where it is accidentally taken. In the latter case the company is still held liable. *McGlother v. Provident Mutual Accid. Co.*, 60 U. S. Appl. 705. This view of the law seems to have been in the minds of the insurance company, and they had apparently made provision for it in the present case. It would seem, therefore, that the law, as we have laid it down, is not applicable. Its application is apparently confined to cases where the provision leaves it doubtful as to whether the insurance company desires to relieve itself from accidental poisoning, or from cases where poison is purposely taken. No such ambiguity occurs in the present case; but the court apparently takes no notice of this fact.

**ANTI-TRUST LAW—POWER OF CONGRESS TO RESTRICT CONTRACTS IN RESTRAINT OF INTERSTATE COMMERCE—ADDYSTON PIPE AND STEEL CO. v. U. S.**, 20 Sup. Ct. Rep. 96.—A combination of cast-iron pipe concerns to regulate the bidding for contracts for sale in various States of the Union of pipe to be manufactured by the successful bidder is in violation of the anti-trust law. Congress has power to legislate against such contracts. See COMMENT. p. 170.

**COMMON CARRIERS—BILL OF LADING—HUTKOFF v. PENNSYLVANIA R. R. Co.**, 61 N. Y. Sup. 254.—A provision in a bill of lading that the carrier shall not be liable for any loss or breakage does not exempt the carrier from the consequences of its own negligence.

Contrary to the general rule the New York courts allow a common carrier, by special contract, to stipulate for exemption from liability even for losses resulting from its own negligence. *Perkins v. Hudson River R. Co.*, 24 N. Y. 196, 82 Am. Dec. 282; *Nicholas v. New York Central, etc., R. R. Co.*, 89 N. Y. 370. Such contracts are not favored, however, and in order to have such an effect must be plainly and distinctly expressed, so that they cannot be misunderstood by the shipper. *Maguire v. Dinsmore*, 56 N. Y. 168. Every matter of doubt under such a contract will be solved in favor of the shipper, and where general words limiting the liability of the carrier may be given a reasonable meaning without making them include losses caused by the negligence of the carrier, they will not be construed as granting an exception from such liability. *Rathbone v. N. Y. C. R. R. Co.*, 140 N. Y. 48; *Kenney v. N. Y. C. R. R. Co.*, 125 N. Y. 422. In the present case the phrase "any loss or breakage" is a general one, and the court construes it according to the rule just mentioned. *Special express provision* against liability for negligence is the only means by which the carrier can avoid such liability. *Nicholas v. N. Y. C. R. R. Co.*, 89 N. Y. 370.

**COMMON CARRIERS—CONTRACTS LIMITING LIABILITY—NEGLIGENCE—MARQUIS ET AL. v. WOOD**, 61 N. Y. Sup. 251.—A contract for the transportation of

goods, stipulating that the carrier shall not be liable for any damage in excess of a specified amount, does not, by the attempt to limit the carrier's liability, relieve it from liability for a loss occasioned by its negligence.

Carriers and shippers may agree upon a certain valuation for property when it is delivered for transportation. Such an agreement is binding, however the loss may be caused, provided it gives the bona fide value of the goods fixed by consent of both parties. *Hart v. P. R. R. Co.*, 112 U. S. 331; *Graves v. Lake Shore R. R. Co.*, 137 Mass. 33.

Where, however, the loss is caused by the carrier's negligence, and the stipulation limiting the amount of the carrier's liability fixes an arbitrary value printed in all bills of lading, and concerning the fairness of which the shipper has not been questioned, such stipulation is generally invalid. *Encyl. of Law V*, 133.

In most States where a carrier is not allowed to stipulate for total exemption from liability for a loss caused by its negligence, a stipulation *limiting* its liability for such loss would also doubtless be held void. *Chicago Ry. Co. v. Chapman*, 133 Ill. 96; *Muller v. P. R. R. Co.*, 134 Pa. 310. But in *Richmond, etc., R. R. Co. v. Payne*, 86 Va. 48, it was held that a carrier might by contract *limit* its liability for loss caused by its negligence, though it could not *exempt itself wholly*.

In New York, where carriers can exempt themselves from all liability for negligence, they certainly can also limit the amount recoverable for negligence. *Belger v. Dinsmore*, 51 N. Y. 166. They must, however, expressly state that the limitation or liability is to cover losses by negligence. No general term like "any damage," as used in the present case, will be sufficient; 89 N. Y. 370.

COMMON CARRIERS—JUDICIAL NOTICE—CUSTOM—*McKIBBIN ET AL. V. GREAT NORTHERN RY. CO.*, 80 N. W. 1052 (Minn.).—In this case the court took judicial notice of a general custom in regard to baggage operating in favor of the plaintiff. It, however, required him to show that the general custom controlled in the particular case, by proving affirmatively that there were no special conditions or limitations imposed upon it by the defendant railroad company in its dealings with him.

This requirement is criticized in a dissenting opinion, which says: "If the conditions and limitations referred to are a part of the general custom, we should take judicial notice of them also. If they are not a part of such general custom, but are restrictions placed on the general custom by the particular railroad company, then the burden was on it to plead and prove the particular limitation or condition so placed by it on the carrying of sample cases."

The court having taken judicial notice of a general custom apparently establishing the plaintiff's case, the burden would then appear to be on the defendant to show any exceptions to the general custom in its favor.

CORPORATIONS—EMPLOYEES—WAGES—CONSTITUTIONALITY OF STATUTE—*STATE V. HAUN*, 59 Pac. 340. (Kan.).—Statute of 1897, I. Chapter 145, provides that it shall be unlawful for any person, firm, company, corporation or agent thereof, to pay any employé any wages except in lawful money or by check or draft. Section second of the act provides that any other mode of payment is void and shall be construed as coercion. By section four the act is made to apply only to corporations or "trusts" or their agents that employ ten or more persons. *Held*, that the act is unconstitutional and void, in that it violates the Fourteenth Amendment to the Constitution of the United States, which provides that it shall not deny to any person within its jurisdiction the equal protection of the laws.

That injustice would result from the enforcement of such an act must be obvious, for by its provision it is not unlawful for any person excepting a corporation which employs ten or more persons to coerce an employé. The point is made that "the same act of the same man would be unlawful to-day if his employer was a corporation or trust and employed ten men, while to-morrow

it would be lawful, provided in the meantime the corporation had discharged one of its employes.

The fact that a laborer shall not be allowed to exchange labor for the commodities of life seems a most startling proposition. *Godcharles v. Wigeman*, 113 Pa. 431-437.

C. J. Darter dissents on authority of *Shafley v. Mining Co.*, 55 Md. 74, and *Budd v. New York*, 148 U. S. 517. In the former case, which was similar to the one under review, the court held the statute to be valid, as the Legislature reserved the right to amend the charter of a corporation. In the latter it was held that a law which applied to elevator owners in places of 130,000 inhabitants, and did not apply to places of less population, was not an unjust discrimination.

**EVIDENCE—UNLAWFULLY OBTAINED—***BACON v. UNITED STATES*, 97 Fed. 35.—A letter written by the comptroller of the currency to the president of a national bank was wrongfully taken from his private box and given to the officers of the United States. *Held*, that such letter was admissible in evidence on the part of the government in a prosecution of the president.

This point is, no doubt, decided according to weight of authority. *Commonwealth v. Dana*, 2 Metc (Mass.) 329, 337; *State v. Griswold*, 67 Conn. 290. While we appreciate the grounds on which these cases are decided, yet the admission of these papers as evidence will allow the person who offers them to profit by his own wrong. Violence will be done to the very spirit of the IVth Amendment of the United States Constitution and of those private actions that can be brought against an invasion of one's right to his papers. The aim of that rule which says a person shall not be compelled in a criminal case to give evidence against himself is destroyed. The dissenting opinion of Baldwin, J., in *State v. Griswold* above, although in a case not directly in point, is a strong expression of the view opposed to what has been generally held on this point.

**EVIDENCE—VARYING RECEIPTS—***TOWER v. BLESSING*, 61 N. Y. Sup. 255.—A receipt of a sum, "in full of all demands to date" is not conclusive on the party executing it, but it may be contradicted or explained by parol evidence.

This decision is in conformity with the rule adopted by the New York courts in regard to receipts in full. They make no distinction between a receipt for a specified sum and a receipt in full. Both furnish only *prima facie* evidence and both are equally open to explanation and contradiction. *Ryan v. Ward*, 48 N. Y. 204. As a general rule a receipt in full is much more conclusive than a simple receipt. *Bouvier's Dictionary*. In general a receipt in full is conclusive when given with a knowledge of all the circumstances, and when a party giving it cannot complain of any misapprehension as to the compromise he was making; 52 Ill., 183; 63 Mich. 690.

In Connecticut a receipt in full will operate as a discharge to defeat any further claims, unless executed under such circumstances of mistake, accident or fraud as will authorize a court of equity to set it aside. *Fuller v. Crittenden*, 9 Conn. 401; *Aborn v. Rathbone*, 54 Conn. 444.

**INTERPRETATION—ACT REGULATING THE PRACTICE OF MEDICINE—OSTEOPATHY—NOT AN AGENCY WITHIN THE MEANING OF 92 OHIO LAWS 44—***STATE v. LIFFRING*, 55 N. E. 168 (Ohio).—The language of the act is "Any person shall be regarded as practicing medicine or surgery within the meaning of this act, who shall append the letters M.B. or M.D. to his name or for a fee prescribe, direct, or recommend for the use of any person any drug or medicine or other agency for the treatment, cure or relief of any wound, fracture or bodily infirmity or disease." Liffing was indicted for practicing without a certificate. The indictment was based upon the fact that he had for a fee prescribed osteopathy—defined in the case as a system of rubbing or kneading portions of the body—as a cure for a certain disease. The fact was admitted, but it was held not an agency within the meaning of the act.

The intention of the Legislature must be presumed to have been to protect the public from dangerous drugs, medicines, or other agencies in unskilled hands. This intention must be paramount. *U. S. v. Fisher*, 2 Cranch 399.

**JUDGES—INTEREST—DISQUALIFICATION—FIRST NATIONAL BANK OF RAPID CITY v. MCGUIRE**, 80 N. W. 1074 (S. D.).—An action of foreclosure was brought by a corporation before a circuit judge whose wife was a stockholder in the corporation. *Held*, that the judge was disqualified to try the cause on the ground of personal interest, since his wife, though not a party to the suit, was directly interested in the result, and since he, though under the law of the State having no present interest in, or control over his wife's property, would yet succeed to a portion of it in case of her death, and would be, in law, presumptively an heir to her estate.

This decision rests purely upon common law grounds, there being no constitutional provision or statute in South Dakota disqualifying a judge from sitting in a cause on the ground of interest, or of relationship to a party. At common law relationship to a party was not a disqualification (*Am. and Eng. Encyc.*, Vol. 12, p. 47), so that the question of pecuniary interest of the judge was the only one to be considered. We have found no case involving precisely the question here.

**MANDAMUS—CORPORATION—IN RE PIERSON**, 60 N. Y. Sup. 671.—Mandamus to compel a corporation to allow petitioner, a stockholder, to examine its books, to see if it is not selling gas at a loss, is properly denied, it being shown that it has cut the price of gas to meet competition, and thus retain its customers, and there being no advantage to the stockholders or the company in an application to the attorney-general or for a receiver, which the petitioner proposes to make if he finds that such sale is being made at a loss.

The right of a member of a corporation to inspect the books of the company for proper purposes is well settled in the *U. S. v. Mor. Priv. Corp.*, and mandamus is the proper remedy. But in this case the purpose was not deemed a proper one. Members of a corporation have no right on speculative grounds to call for an examination of the books in order to see if, by any possibility, the company's affairs may be administered better than they think they are at present. *King v. Masters and Wardens of the Merchant Tailors Co.*, 2 Barn. & Adol. 115.

**MUNICIPAL CORPORATION—PUBLIC IMPROVEMENTS—CONSTRUCTION OF VIADUCT—DAMAGES—LIABILITY OF MUNICIPALITY—SAUER v. MAYOR, ETC., OF THE CITY OF NEW YORK**, 60 N. Y. Sup. 648.—*Held*, city is liable to abutting owner for damages caused by erection of viaduct in the street in front of his premises, by which he is deprived of easement of light, air and access.

The question was whether such damages came within the clause of the New York Constitution, which says "private property shall not be *taken* for public use without just compensation." In other words, was this a *taking* of property? The court held that the rights of abutting owners are in the nature of easements. Easements are property, and therefore cannot be taken without compensation. *Kane v. N. Y. E. R. R. Co.*, 125, N. Y. 164.

Under the same constitutional provision a different result was reached in other States. In Illinois, under the old Constitution, an abutting owner could not recover for consequential injuries, but only for *direct physical injury* to his property. *Rigney v. Chicago*, 102 Ill. 64.

But the corresponding clause in the present Constitution of Illinois, adopted in 1870, says "private property shall not be taken or *damaged* for public use without compensation." Similar clauses are found in a number of State constitutions adopted since 1870, and where this is so the decisions are uniform to the effect that, in a case like the present, the abutting owner may recover.

**MUTUAL BENEFIT INSURANCE—RIGHTS OF BENEFICIARIES—OVERHISER ET AL. V. OVERHISER**, 59 Pac. 75 (Colo.).—The A. O. U. W. by-laws provide that the beneficiary shall be named in the certificate and shall be within one of certain designated classes, and in case of death, provides that the fund shall go to certain heirs in the absence of any direction by the insured. A wife obtained a divorce prior to the death of her husband, who held an insurance in the above-named society. *Held*, that divorce was not the legal equivalent to the death of the beneficiary and that the heirs could not take the fund.

There seems to be a wide diversity of opinion by jurists on this question. A wife, where divorced, has generally lost her rights. *Tyler v. Odd Fellows' Mut. Relief Assoc.*, 154 Mass. 134. Nevertheless, the decision in the case under review seems correct. The contract of insurance did not need any interpretation, and when entered into the beneficiary was competent to take under the by-laws. Nor was there any prohibition in the by-laws incapacitating the beneficiary from taking the fund owing to a legal separation. It is a well-known principle that the courts treat a policy of life insurance as something like a testament. *Bolton v. Bolton*, 73 Me. 299. Construing the policy as a will, the beneficiary named therein would take, as the insured failed to revoke the instrument by the designation of a new beneficiary.

**NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—HILL V. STATE**, 53 S. W. 845 (Tex.).—Where defendant moved for a new trial on the ground of newly-discovered evidence to prove insanity. *Held*, that it should be granted, though in strictness the evidence was not newly-discovered.

We are unable to find authorities in any State except Texas which have followed this exception to the rule for a new trial upon newly-discovered evidence, where the plea is insanity. In Texas this exception was made in *Schwenler v. State*, 19 Texas, App. 872, and followed in *Horhouse v. State*, 50 S. W. 362, and the Texas courts seem disposed to strengthen these precedents.

**PERSONAL INJURIES—TRIAL—PHYSICAL EXAMINATION—WANCK V. CITY OF WINONA**, 80 N. W. 851 (Minn.).—*Held*, in an action to recover damages for a personal injury, that the trial court, upon application by the defendant, could order the plaintiff to submit himself to a physical examination by disinterested physicians, under penalty of having his suit dismissed upon refusal to obey; and that the court erred in refusing to so order, though defendant's physician had previously attended plaintiff, and had opportunity to examine him.

The rule here laid down accords with that in many States, but conflicts with that in others, and with that applied by the Supreme Court of the United States in *Union Pacific R. Co. v. Botsford*, 141 U. S. 250, where it is asserted that no such power is vested in the court, either by the common law or by act of Congress. Justice Brewer, however, in a dissenting opinion, lays down a rule very like that given in the present case. He says: "It is said that there is a sanctity of person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration."

**PRESUMPTION AS TO COMMON LAW—SISTER STATES—BLETHEN V. BONNER ET AL.**, 53 S. W. 1016 (Tex.).—Where the Constitution of Massachusetts, adopted in 1780, providing that all laws previously adopted in the Colony of Massachusetts Bay and usually practiced in the courts of law shall remain in full force until repealed by the Legislature, such parts only excepted as are repugnant to the Constitution, was offered in evidence. *Held*, to be insufficient proof in an action in Texas to establish the fact that the common law was in force when such Constitution was adopted.

It has been a familiar rule that the courts of one State will presume the common law to be in force in a sister State at a given time, in the absence of evidence. The Texas courts do not follow it, however, and say in this case that they do not believe the "indulgence in presumptions" the safest guide.

**PRIVILEGED COMMUNICATIONS—RIGHT OF ATTORNEY TO COMMENT UPON FAILURE TO CALL FAMILY PHYSICIAN—CITY OF WARSAW V. FISHER, 55 N. E. 42 (Ind.).—Held,** that in an action for damages resulting from personal injuries, counsel for defendant may properly comment upon plaintiff's failure to call as a witness his attending physician. See COMMENT, p. 171.

**PUNITIVE DAMAGES—KNOXVILLE TRACTION CO. V. LANE ET UX., 53 S. W. 557 (Tenn.).—Where** plaintiff, while a passenger on defendants' street car, was insulted by motorman. *Held,* that the jury might find exemplary damages, although the company did not authorize nor ratify the act and was innocent of any negligence.

There are two rules for the liability of a corporation in exemplary damages for the acts of its servants. The prevailing one holds the corporation liable where the servant or agent would be liable to such damages. *Goddard v. Railway Co.*, 57 Me. 202. The other requires the corporation to ratify or authorize the act. *Hale on Damages*, p. 219; *Turner v. R. Co.*, 34 Cal. 594.

The Supreme Court of Tennessee in this case insists that the true reason for allowing such damages is solely the breach of the contractual relation between plaintiff and the company. The rule seems severe, as it demands nothing more nor less of a corporation than supernatural foresight in selection of employes.

**RAILROADS—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—YOUNG ET AL V. SYRACUSE, B. & N. Y. R. R. Co., 61 N. Y., Supp. 202.—A switch** was so placed that it could be seen only 60 feet away. The engineer who ran into the switch when open had been on the road about fourteen years, knew of the position of the switch and the company rule that it should be approached with great care. *Held,* whether engineer assumed risk of employment or was guilty of negligence was a question for the jury. Smith, J., dissenting.

This is a close case on the point of what a court is to consider a matter of law and what it is to leave to a jury. We take it that the principles on which this case is decided are well settled; that the rule in *Pautzer v. Tilly Foster Mining Co.*, 99 N. Y. 368, 2 N. E. 24, as to a workman's presupposing his master to have provided safe appliances, is modified by an employe's knowing of an obvious defect, making no objection and continuing in employment. *Krog v. Chicago*, 32 Iowa 357. But the defect must be obvious and of such a kind that the injured person could have kept its dangerous character in mind without an effort.

**STREET RAILROADS—CONTRIBUTORY NEGLIGENCE—BRAINARD V. NASSAU ELECTRIC R. R. Co., 61 N. Y. Sup. 74.—A man who surrenders his seat on a crowded street car to a woman and stands on the running board of the car, is not, as a matter of law, negligent. Riding on the running board of a crowded street car is not *per se* negligence.**

Both of the points decided are somewhat novel in character. Surrendering one's seat to another passenger does not constitute contributory negligence as a matter of law. Such question is usually one of fact and depends upon the circumstances. *Lehr v. R. R. Co.*, 118 N. Y. 556, 23 N. E. 889; *Still v. R. R. Co.*, 52 N. Y. Sup. 975. In the present case the surrender was made to a woman who may be presumed to have been weaker than the deceased. The words of Hatch, J., are worthy of note: "Custom, even at Coney Island, has not deadened all sense of courtesy, and if it had, we should continue to think that the law of negligence has still a sufficient respect for the amenities of life as not *per se* to charge as negligence the surrender of a seat by a man to a woman."

**SUITS AGAINST PUBLIC OFFICERS FOR OFFICIAL MISCONDUCT—LAW GIVING RIGHT TO BE INDEMNIFIED BY MUNICIPALITY UNCONSTITUTIONAL—IN RE JEN-**

SEN. 60 N. Y. Supp. 933.—*Held*, that a law, retrospective in its nature, enabling public officials to be indemnified by the municipality, for reasonable counsel fees and expenses paid or incurred in successfully defending prosecutions against them for official misconduct, is unconstitutional. See COMMENT, p. 173.

TAXATION—SITUS OF NOTES AND MORTGAGES OWNED BY A NON-RESIDENT—NEW ORLEANS V. STEMPLE, 20 Sup. Ct. Rep. 110.—*Held*, notes and mortgages in the hands of an agent for collection and deposit are subject to taxation where found, irrespective of the domicile of the owner.

While this has been the doctrine in many States, it has not been affirmed before by the Supreme Court. Bank notes and municipal bonds, it is well settled, are sufficiently tangible to be taxed where found. The Supreme Court has held, too, that shares of stock in national banks may for purposes of taxation have a situs of their own, *Tappan v. Merchants' Nat. B'k*, 19 Wall 490; and that a State may tax the interest in land in the State of a non-resident mortgagee. *Savings and Loan Soc. v. Multnomah County*, 169 U. S. 421; but that bonds, mortgages and debts generally have no situs independent of the domicile of the owner. *State Tax on Foreign-held Bonds*, 15 Wall 300. The last is here construed not be a denial of the power of the Legislature to establish such independent situs for bonds and mortgages. The words of the court go beyond the authorities and the necessities of the facts in hand, and would cover any case where the bonds and mortgages are found in the State, whether in the possession of an agent or not. It would seem that they should not be taxed irrespective of the domicile of the owner unless they have acquired some sort of a permanent business situs.

VICE-PRINCIPAL—CONDUCTOR OF A FREIGHT TRAIN—NEW ENGLAND R. R. CO. V. CONROY, 20 Sup. Ct. Rep. 85.—*Held*, the conductor of a freight train is not a vice-principal so as to make the company liable for the injuries of a fellow-servant caused by his negligence. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, overruled. Justice Harlan dissents. See COMMENT, p 174.

WITNESS—IMPEACHMENT—TRIAL—STATEMENTS IN ARGUMENT—BECKER V. CAIN, 80 N. W. 805 (N. D.).—In this action the defendant attempted to impeach the testimony of the plaintiff as to his ownership of certain goods, by proving a statement made by the plaintiff in his argument as attorney in a previous action, inconsistent with such testimony, which statement, upon cross-examination, the plaintiff denied having made. *Held*, that such statement was inadmissible as evidence in the present action, and so incompetent to impeach plaintiff's testimony.

This is an interesting application of the rule that statements of an attorney in his argument are statements, not of fact, but of the evidence in the case, and what, in his opinion, that evidence tends to prove. The statement being thus irrelevant to the issue, it was accordingly inadmissible for the purpose of discrediting the witness. *I. Greenleaf Evid.*, Sec. 449.



## BOOK REVIEWS.

**The Law of Animals. A Treatise on Property in Animals Wild and Domestic, and the Rights and Responsibilities Arising Therefrom.** By John H. Ingham. T. & J. W. Johnson & Co., Philadelphia. Law sheep, pp. 800.

Mr. Ingham has covered a subject which, strangely enough, has never before received the consideration of any text-writer, although a subject on which there has been a great number of adjudicated cases, and one which treats of a species of personal property whose attributes place it on a footing peculiar to itself i. e., the necessity of considering the animal's nature, disposition, habit and liability to injure and be injured. A few of the headings of the author's divisions will show how carefully and completely the ground has been gone over. "Property in wild and domestic animals," under which division, among other things, the decisions on the mooted question of whether the dog is the subject of larceny or of a civil action only, are collected and compared. "Taxation, Sale and Mortgage of Animals," containing a full discussion of warranties; "Rights of Owners" of animals which have been killed, injured or stolen; "Liabilities of Owners," "Bailment and Carriage," "Cruelty and Game Laws," "Injuries by Railways," "Fencing Laws," etc. This excellent volume will be of inestimable value to the practitioners in small cities and country towns, where questions along this line are continually arising.

**A Treatise on the Law of Domestic Relations.** By W. C. Rodgers. T. H. Flood & Co., Chicago. Sheep, pp. 900.

Propositions involving the law of domestic relations are constantly confronting the lawyer, and especially the young practitioner. In Mr. Rodgers' new work practitioner and student alike will find this important subject skillfully and accurately treated. A most noteworthy fact is, that the work has been entirely compiled by the author, thereby avoiding the many errors which are so apt to creep in where clerks are employed. Another feature of the treatise is that while the old law has not been overlooked, a large percentage of the citations are recent, a matter of no small importance. The rights and liabilities which arise owing to the entering into of contracts by those occupying relations such as to involve the litigation of relative rights, together with the property rights involved by such relationship, compose many of the most knotty problems which confront the general practitioner, and are matters treated by the author in a most comprehensive and exhaustive manner.

# YALE LAW JOURNAL

---

Vol. IX.

MARCH, 1900.

No. 5

---

## WEBSTER ON THE TERRITORIES.

The new field of legislation, which our acquisition of Puerto Rico and the Philippines has opened before us, makes the constitutional relation of Congress to the Territories of unusual importance. Respecting this question two views are held, differing from each other theoretically and practically. One is that the Territories are part of the United States, and under the Constitution; the other is that they are neither the one nor the other. The former view may be designated constitutionalism, the latter extra-constitutionalism. Of the extra-constitutionalists the great protagonist is Webster, though his authority is cited oftener than his argument. An examination of his argument will perhaps explain this fact.

In the United States Senate, during the session of 1848-49, a remarkable debate arose on a proposition to "extend" the Constitution over the territory recently acquired from Mexico, comprising the Territorial divisions of California, New Mexico, and Utah. The supporters of this proposition, holding that the Constitution sanctioned the introduction of slavery into such territory, assumed that Congress, by simply declaring the Constitution to be "extended" over the territory, would put the Constitution, so far as applicable, in full operation there, without the necessity of specific legislation for the purpose, thereby enabling slavery, as they hoped, successfully to run the gauntlet of a hostile majority in Congress, and effect a standing, if not a lodgment, in the new Territories.

The proposition called up Mr. Webster, from whose speech on the occasion I quote as it is given in Benton's "Examination of the Dred Scott Decision," a pamphlet zealously upholding Webster's position. He began by saying:

"It is of importance that we should seek to have clear ideas and correct notions of the question which this amendment of the member from Wisconsin has presented to us; and especially that we should seek to get some conception of what is meant by the proposition, in a law, to 'extend the Constitution of the United States to the Territories.' Why, sir, the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. There is no cause for the operation of the legislative power in such a manner as that."

Assuredly, there is not; and there is, what Mr. Webster apparently overlooked, as little cause for the operation of the legislative power for such a *purpose* as that. It is the office of legislation to *execute* the Constitution, not to *extend* it. The word *extend*, as we have just seen, was used insidiously in the Senate proposition, to import not the mere fact that the Constitution extended over the new Territories, but the execution of the Constitution within those Territories, so as to dispense with the further action of Congress in opening them to the admission of slave property; and Mr. Webster's qualifying phrases show that he inadvertently countenanced this artful confusion of language, for there is no "form" or "manner" in which legislation can extend the Constitution, unless *extend* be used in the sense of *execute*. In the circumstances, his submission in any degree to this "weak invention of the enemy" seems unaccountable.

The Constitution does not need to be extended. Though not self-executing, it is self-extending; it goes with the land of which it declares itself to be the supreme law, as the form goes with the substance. It is co-extensive with the political jurisdiction of the government that it creates, requiring, indeed, the intermediation of Congress to carry its powers into effect, but requiring or permitting no extraneous agency to extend it. As the organic law, the Constitution cannot be extended, in any proper sense of that term, save by amendment in accordance with its own provisions; and amendment is an act involving the special sanction of the sovereign, for the power to amend the Constitution is itself a delegated power—a power delegated to the people of three-fourths of the States respectively, by the people of all the States respectively, in whom alone resides the sovereignty in our political system. Three-fourths of the States may lawfully amend the Constitution, but only the whole number of the States could lawfully abolish it. All the States made the Constitution, and less than all the States cannot unmake or remake it, except by force. The Constitution

itself, in providing that it should be established when nine States ratified it, provided also that it should be established only between the States ratifying it, thus requiring virtually that the ratification should be unanimous. If Rhode Island, the last of the thirteen States that ratified the Constitution, had not ratified it, the Constitution would have been established nevertheless, but Rhode Island would not be to-day a member of our body politic.

Congress, therefore, cannot extend the Constitution in any mode. It of course can extend its own laws; and it was the linking of the Constitution with these in the proposition offered in the Senate—implying that the Constitution was extended over the Territories in the same sense as the enumerated laws, and would be equally operative, independently of special legislation—which constituted the undoubted subtlety of the scheme; wherein contemporaries professed to have no difficulty in tracing the “fine Italian hand” of Mr. Calhoun, who was in the Senate, and defended the proposition in debate.

The proposition was certainly fallacious, as well as insidious; but Mr. Webster, while rejecting rather than exposing the fallacy, committed another, not less transparent, and much more serious. The reason why Congress cannot “extend” the Constitution to the Territories he went on to explain as follows:

“What is the Constitution of the United States? Is not its very first principle, that all within its influence and comprehension shall be represented in the legislature which it establishes, with not only a right of debate and a right to vote in both Houses of Congress, but a right to partake in the choice of the President and Vice-President? And can we by by-law extend these rights or any of them to a Territory of the United States? Everybody will see that it is altogether impracticable.”

This “principle,” thus phrased or paraphrased, obviously implies nothing less than that the Territories are independent of the Constitution. Mr. Webster called it the “very first principle” of the Constitution, though the principle is not expressed in the Constitution, nor does the Constitution, in some of its important provisions, conform to the principle, as he travestied it. The Constitution does not grant the District of Columbia these rights or any one of them, but, on the contrary, denies them all to it, not temporarily but permanently. Is the District of Columbia not within the “influence and comprehension” of the Constitution? And do the sites of the forts, magazines, arsenals, dock-yards, and other needful buildings

of the United States, stand with the District of Columbia, and with the Territories, outside of the Constitution that expressly provides for the government of them all?

The right to be represented in Congress and the Electoral College is not a test of the nationality of a region, any more than the right to vote or hold office is a test of citizenship. The test of nationality in this relation, instead of being representation in the government, is subjection to its jurisdiction; and it will not be disputed that the Territories, as well as the District of Columbia, and the other places named, are under the jurisdiction of the government, or that the government, with its jurisdiction, is the creature of the Constitution. How, then, could it be seriously said that the Territories are not within the "influence and comprehension" of the Constitution?

Much acuteness has been wasted in this inquiry, it appears to me, in exploring the meaning of the term "United States." That term is the name of a body politic created by the Constitution, of which body politic the States united under the Constitution are the members, and the jurisdiction whereof is co-extensive with the territory, as conversely the territory is co-extensive with the jurisdiction, itself created and defined, I repeat, by the Constitution. All the territory subject to the United States, therefore, is subject to the Constitution of the United States: the States, the District of Columbia, the other places ceded by States to the United States, the Territories, organized and unorganized, are but divisions of the general territory under the jurisdiction of the United States, and, consequently, under the Constitution. The extent of the territory over which the United States exercises jurisdiction is a question of fact, to be determined as such; the question of the limitations of the jurisdiction is a question of law, to be determined by the Constitution that grants the jurisdiction.

The name of a body politic, whatever the name may be, can have nothing to do with the extent of the territory subject to the body politic, which depends on the vicissitudes of its affairs. As a body politic the United States supposes no territory, except as the necessary theatre of its operations—that is, in the vague sense in which territory necessarily enters into the conception of a nation. The extent of the territory of the United States is not a constitutional question, and cannot be answered by anything contained in the Constitution. One might as well look into the Constitution to find the name of the individual who is President at this time, or the

amount of the receipts and expenditures of the government for the last fiscal year. The simple existence of the government in operation implies territory of some extent, as it implies a President of some name, and receipts and expenditures of some amount; but not otherwise. Save in this sense, the term "United States" is not used at all in the Constitution to express extent of territory. As to the actual extent of the territory of the United States, it expresses or implies nothing. It is as silent respecting the extent of the territory as it is respecting the extent of the population. And this is equally true of the several States composing the body politic of the United States, all of which are themselves bodies politic.

It follows that with respect to the subject under discussion the term "United States" has no significance. It is simply the corporate name of the general government, throwing as much light, and as little, on the powers of Congress over the Territories, as the style "The People of the State of New York,"\* for example, throws on the powers of the New York Legislature over the Adirondacks, or the Erie Canal, or any other subject of legislation in the Empire State. And this, whether the term "United States" is used to denote the body politic or the members of the body politic collectively, the difference between the two uses being that the former use conveys unity of idea, the latter plurality, as the term "Congress," though as unitary as that of "legislature," is used plurally in the Constitution, and till recently was used by good writers in the singular and the plural indifferently (it was used in the plural by Mr. Webster in one of the passages quoted below), though its plural use has nearly passed out of vogue, as the plural use of "United States" is gradually passing, under stress of the ever-increasing sense of unity in the national life. This I deem a wholesome sign, marking the progressive confirmation of our nationality, without indicating a tendency to political consolidation, which, undoubtedly, would be a symptom of national decay. But the bearing of the term in question on any point of constitutional construction is nil.

Whatever territory, then, is subject to the jurisdiction of the United States is within the United States, and under the Constitu-

---

\*Suppose the constitutional name of our Country, instead of being "United States of America," were "Republic of America," the Constitution in other respects remaining as it is. Would anybody in that case vex the name to tell him whether or not the Territories were a part of the Republic of America, and subject to its Constitution? The question answers itself, and at the same time exposes the fallacy of this *argumentum ad nomen*.

tion. How great or little it may be at a given period (it is now upwards of a hundred thousand square miles greater than it was a year ago) is a question of fact, as said before, to be settled by evidence, in lieu of a priori reasoning; but if we would know, what is infinitely more important, the powers of the United States over the territory subject to its jurisdiction, we must turn not to the name but to the Constitution of our country. A corporation, it is to be remembered, does not consist in the possessions of its members or in its own possessions, but in its franchises, which are set forth in its charter, not infolded in its name. Examining the name of a corporation, to ascertain the powers of the corporation, is attempting to make the tail wag the dog, if the expression may be allowed. The method, aside from its futility, involves a tremendous loss of mental leverage.

It will be said that the final clause of the thirteenth amendment implies that places subject to the jurisdiction of the United States are not of necessity within the United States. The clause does appear to imply this distinction, but the appearance is due to the fact that the term "United States," though used only a single time in the amendment, is used in two ways at once—to signify the members of the body politic, and at the same time the body politic itself—which is more than human language can bear without torsion. However, as the members of the body politic constitute the body politic, and "United States" as the name of the latter is put by metonymy for the former in the Constitution and in constitutional literature, the two modes of use, while confusing when mixed together in the same term at the same time, are equivalent to each other, and the final clause, referring to the one mode, and the penultimate clause, referring to the other, have the same denotation; so that the final clause, as the outcome of it all, is simply tautological—mere surplusage. It is possibly a literary more than a constitutional blunder. It is certainly a blunder of some sort.

As I may seem to impeach the competency of the authors of the thirteenth amendment, however, it is excusable in this connection to recall the historical fact that the same body which formulated the thirteenth amendment made the admission of the Southern States to their place in the Union conditional on their ratification of that amendment; not only requiring each of those States to exercise under dictation the sovereign power of a State as the price of its recognition as a State, but asserting the legal dissolution of the Union in the hour of its military triumph, and reconstructing it in

open disregard of the \*equality of the States under the Constitution. One may be pardoned for declining to accept as a constitutional authority the body that perpetrated in the face of all the world this colossal and stupendous contradiction. So far as constitutional precedent is concerned, indeed, the reconstruction period might be treated by history, in my opinion, as Tom Marshall said the Tyler Administration should be treated, put in a parenthesis, "which," added Marshall, "Lindley Murray says should be read in a low tone of voice, and may be left out altogether without injury to the sense." This in passing.

The principle which Mr. Webster caricatured in the passage cited above, begging the reader's pardon for digressing, is the familiar principle of no taxation without representation. As a cardinal maxim of free government, it is, in its just import, substantially embodied in the Constitution, nor is the spirit of it violated by any of the provisions of that instrument, not excepting the provisions relating to the District of Columbia and the Territories. Against any real violation of this principle, the District and the Territories alike are guaranteed, through the common interest in their welfare cherished by the representatives of the whole nation, under whose immediate protection the Constitution places them. The Territories have an additional guarantee, moral and political, in being the wards of the nation, and heirs of Statehood—corporate minors; so that their conditional exclusion from participation in the govern-

---

\* Apropos of the equality of the States, it has been asked what could be done, if Utah, disregarding the condition she accepted on her admission into the Union, should establish polygamy. The question is academic at present, and probably will remain so; but, should it become practical, the procedure in the case, it seems to me, would not be doubtful. The Supreme Court would be called on to decide, in the first place, whether or not the condition in question put Utah on a footing of inequality with the other States, none of which are subject to this condition, or to a condition of like import. If the court decided in the affirmative, declaring the condition void, Utah would have to be recognized in this matter as standing on her rights as a State, and the only remedy would be to prohibit polygamy, as slavery is prohibited, by constitutional amendment. If the court decided in the negative, declaring the condition valid, the decision in effect would extend the condition to the rest of the States, virtually making the prohibition of polygamy a part of the Constitution as it is; in which event the procedure would be the same as if the constitutional prohibition were express and formal, in place of constructive. The subject of punishment would not be the State (the general government does not act on a State), but the individual citizen of the State who, misled by the law of the State, should violate the law of the land. On this sound principle of procedure the rebellion was put down.



ment is no more a violation of the principle in hand, when stripped of hyperbole, than is the conditional exclusion of natural minors from participation in the suffrage. The rights of Statehood, in the one case, like the rights of manhood, in the other, are simply in abeyance.

In both cases, Mr. Webster's "very first principle" of the Constitution, accepting the extravagant form in which he stated it, is given its proper effect, and the rights that he declared it impracticable to extend to a Territory are in a broad sense actually extended under the Constitution to every Territory (and have been since the organization of the government), as soon as the Territory becomes qualified for admission as a State into the Union—comes of constitutional age; they are withheld only during its constitutional minority.

Thus the Territories, judged by a fair application even of Mr. Webster's exaggerated criterion, to say nothing of the express and the implied provisions of the Constitution authorizing Congress to govern them, and nothing of the constitutional prohibitions on Congress in the act of governing them, are subject to the Constitution at all points; as must needs be, we have seen, if they are subject to the United States, which has no jot of power not delegated by the Constitution. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States," the Constitution says, "are reserved to the States respectively or to the people." This goes indeed without saying. It is a corollary from the Constitution. As the powers of the government are all delegated powers, a power not delegated is necessarily reserved. Even a power prohibited to the States, if not delegated to the United States, is reserved to the people of all the States, respectively—the sovereign; subject to whose will the individual States hold all their powers. A sovereign not absolutely sovereign is not a sovereign.

In the debate on the Resolution to annex Hawaii, a distinguished Senator\* (who made a very instructive speech on the wrong side) boldly reversed, in the face of the Constitution, this principle of reserved powers, for the purpose of showing that the right to acquire territory is not a constitutional right, express or implied, but an undelegated right of sovereignty—"an inherent, sovereign right," he styled it. "The right to acquire territory," said this Senator, "was not reserved, and therefore it is an inherent, sovereign right. Look the Constitution through, study its clauses,

---

\* Senator Platt, of Connecticut.

and you will find in it no suggestion that there was any reservation of the right to acquire territory to the States or to the people." The Senator would seem to have spoken under the impression that the Constitution enumerates the reserved powers, and lumps the delegated powers. He could not have been fresh from his "study" of the tenth amendment. If the right to acquire territory was not reserved, as he says, and says truly, it must be delegated, for all the rights of the nation are either reserved or delegated; there are no middle rights. Every right of sovereignty, whether reserved or delegated, is inherent, but inherent in the sovereign, at whose will it may be revoked if delegated, or delegated if reserved. The rights of the sovereign as such are inalienable and indefeasible.

Accordingly, there is in our government, which consists exclusively of delegated powers, no such thing as an inherent power that is neither reserved nor delegated. A power not delegated is reserved; a power not reserved is delegated; and, while both powers are inherent in the nation, neither is inherent in the government, which is the nation's deputy, expressly authorized and expressly bound by the Constitution. In the complex community known as the United States, the sovereignty, as said above, is lodged in the people of all the States respectively, acting separately, and unanimously, as when they established the Constitution. It is to this collective sovereign that every department of the government, the government as a whole, and even the commanding group of States empowered to amend the Constitution, bow submissively; but which itself bows to no power on earth. It is only to this sovereign that undelegated powers belong, and not to the government which this sovereign has specially delegated to do its bidding. There is but one way in which the government of the United States can lawfully get possession of an undelegated power—by a supplementary delegation in an amendment to the Constitution; there is no store of powers, undelegated and unlimited, whereon the government may draw *ad libitum* or draw at all—no short cut to the reserved powers, except by usurpation. If this doctrine is not true, we might as well tear up our Constitution, and give the fragments to the wind; for in that case the government which the Constitution creates may at pleasure do it for us, and ultimately will, usurping one after another, under the guise of its own inherent power, the reserved powers of the sovereign, till it becomes itself the sovereign, and the people become its slaves.

It should be added that the Senator under notice dwelt at some length on the right of acquiring territory by discovery and occupa-

tion, as a right neither reserved nor delegated, yet possessed by the government as "an inherent, sovereign right." Concerning this view it will suffice to point out that the right of discovery and occupation exists by the law of nations, which is incorporated in the Constitution (written or unwritten) of every government, and is expressly made a part of our own Constitution by the eighth section of the first article. Hence, the right, so far as concerns our government, is a delegated right—as much so as the right to borrow money or to coin it. The notion of inherent rights in the government of the United States is a logical and political illusion. It is more. It is an invitation and a cloak to usurpation.

Let us return to Mr. Webster. Continuing his speech, he thus unfolded the implication of his "very first principle":

"The Constitution is extended over the United States, and over nothing else. It cannot be extended over anything, except over the old States, and the new States that shall come in hereafter, when they do come in. \* \* \* It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty, is extended by force of the Constitution itself over every new territory. \* \* \* It is said that this must be so, else the right of *habeas corpus* would be lost. Undoubtedly these rights must be conferred by law, before they can be enjoyed in a Territory."

The fact that "these rights must be conferred by law, before they can be enjoyed in a Territory," Mr. Webster adduced as evidence that the Constitution does not extend over a Territory, though his language in the third sentence distinctly implies, in flat opposition to his express assertion in the preceding sentence, that the Constitution does extend over a Territory, denying only, what nobody affirms, that the Constitution by its own force carries its provisions into effect in a Territory. In trying to uphold his conclusion he appears to have upset his premises. The fact is that "these rights" must be both enforced and conferred by law, before they can be enjoyed in a Territory, or State either, or anywhere else. In a State, they are conferred by the State Constitution, and enforced by the State legislature; except within the exclusive jurisdiction of the federal government, where they are conferred by the federal Constitution, and enforced by the federal legislature. In a Territory, they are conferred as well as enforced by the federal legislature, as the supreme authority of the Territory, exercising on its behalf the powers of a State; except also within the exclusive jurisdiction of the federal government, where, as under the like jurisdiction in a

State, they are conferred directly by the federal Constitution, and enforced by the federal legislature as such, not as the legislature of the Territory. A frame of government cannot act by its own force anywhere. It needs everywhere the exercise of legislative power to put it into effect.

It is this necessity simply, and not the extra-constitutionality of the Territories, that Mr. Webster's citation proves. The evidence cited is true, but not relevant. The point which he undertook to make is not that legislation is necessary to execute a provision of the Constitution extending to a Territory or elsewhere, which is constitutional commonplace, but that the Constitution itself does not extend to a Territory. The Constitution unexecuted in a Territory, though extending over it (existent in it), is one thing; the Constitution not only unexecuted in a Territory, but unextended over it (inexistent in it), is quite another thing. The latter thing is what Mr. Webster announced as his thesis; the former thing, that everybody admits, is what he proceeded to maintain. He stepped at once into the fallacy of irrelevant conclusion—a strange step, at any stage, for the Expounder of the Constitution, in the act of expounding it. Evidently (though that is not less strange) he was still, in a fitful way, confounding the extension of the Constitution with the execution of it. A subsequent turn of his mental kaleidoscope, however, while replying to Mr. Calhoun, brought him face to face with the question that he had engaged to argue; and he at last argued it. Subjoined is his argument—the argument on which, to do him justice, the partisans of extra-constitutionalism have since relied, and rely now:

“The honorable Senator from South Carolina, conversant with the subject as he must be, from his long experience in different branches of the government, must know that the Congress of the United States have established principles in regard to the Territories that are utterly repugnant to the Constitution. The Constitution of the United States has provided for them an independent judiciary; for the judge of every court of the United States holds his office upon the tenure of good behavior. Will the gentleman say that, in any court established in the Territories, the judge holds his office in that way? He holds it for a term of years, and is removable at Executive discretion. How did we govern Louisiana before it was a State? Did the writ of *habeas corpus* exist in Louisiana during its Territorial existence? Or the right to trial by jury? Who ever heard of trial by jury there before the law creating the Territorial government gave the right to trial by jury? No one.”

The reader will notice—passing by these verbally mixed and wholly irrelevant interrogatories, already answered by anticipation—that Mr. Webster, in opening his argument, affirmed of the Territories: “The Constitution of the United States has provided for them an independent judiciary.” This affirmation is just; but, if the Constitution has provided for them an independent judiciary, how can that provision make or leave them independent of the Constitution? Does it not, contrariwise, assert unequivocally their subjection to the Constitution? And how can “principles,” for whose establishment the Constitution has provided, be “utterly repugnant to the Constitution?” Having after much zigzagging touched at length his main argument, the first use he made of the contact was to surrender his case. But, for sake of the argument, we will return him his case.

The facts of the case are in substance as Mr. Webster stated them; so far as he stated them. The judiciary article of the Constitution, as modified by the amendments, requires among other things that the judges of the federal courts shall hold their offices during good behavior, and that in those courts the trial of specified suits at common law, and of all crimes, except in cases of impeachment, shall be by jury. These are facts, on the one hand; on the other hand, Congress, irrespective of the judiciary article of the Constitution, has established, with the sanction of the Supreme Court, and the general assent of the people, Territorial courts the judges of which hold their offices during a term of years, and in which trial by jury, in both civil and criminal cases, is in the discretion of Congress granted or withheld, partially or wholly. Such are the facts to which Mr. Webster referred. They prove, he argued, that the Constitution does not extend over the Territories; which, by consequence, are independent of the Constitution, and not a part of the United States.

The argument is on the face of it a fallacy; since it assumes, not only without evidence but in spite of proof, that if the judiciary article of the Constitution does not extend to the Territories no other provision of the Constitution does; whereas in the teeth of this assumption, inadmissible in itself, is the acknowledged power of Congress to govern the Territories implied in the power to acquire new territory, and the express power of Congress “to make all needful rules and regulations” respecting the territory belonging to the United States. This is not all. The fallacy takes other subject-matter, and goes deeper.

The argument assumes, in addition to the false assumption just

mentioned, that if the judiciary article of the Constitution does not extend to all classes of cases in the Territories, it does not extend to the Territories at all. But the judiciary article of the Constitution, according to its own terms, extends only to the classes of cases that it enumerates. It does not extend to all classes of cases either in the States or in the Territories. It in fact extends to precisely the same classes of cases in the Territories as in the States—that is, to all cases of federal cognizance in both, and to no case of purely local cognizance in either. The jurisdiction of the federal judiciary, like that of the federal government at large, is federal only. It does not deal with controversies entirely local. The argument presupposes that the government of the United States, so far at least as relates to its judicial power, is a consolidated republic, instead of a federal republic. It mistakes the genius of our institutions.

Excepting cases between citizens of the same State claiming lands under grants of different States, the Constitution, indeed, in no provision and no instance, directly contemplates the cognizance of disputes between citizens of the same local community, be it a Territory or a State. With respect to such disputes, which involve nearly every object of human concern, the local government, whether Territorial or State, is under the Constitution free to establish its own judiciary, subject only to its own supreme law (the will of Congress in the case of a Territorial government), without regard to the special conditions imposed on the federal judiciary. The people of the several States at the formation of the government, having already incorporated into their State Constitutions the time-honored guarantees of personal liberty, naturally demanded the incorporation of these into the federal Constitution, not as restrictions on themselves, but as security against the encroachments of a government at once supreme in authority and beyond their immediate control. Their demand was granted, partly before the adoption of the Constitution, partly after; with the simple effect of adding to the restraints on the federal government, without subtracting a tittle from the powers of the States.

The bill of rights, that guards the personal liberty of the people of a State from the encroachments of their own legislature, is to be looked for in their own Constitution, not in the federal Constitution, which guards them from the encroachments of the federal legislature only. The provisions constituting a virtual bill of rights in the federal Constitution have no application to a State (whether infant or adult), though every State has in its own Constitution (and

Congress enacts for every Territory) similar provisions of equal or greater efficacy, adopted without reference to the federal Constitution, many of them before that Constitution itself was adopted. It belongs to a State in our system to order its own domestic affairs in general. The Constitution leaves the people of the several States supreme especially in the field of personal liberty. Therein the people, having the power immediately in their own hands, are trusted to protect their own rights, in their own way. In that *sanctum sanctorum* of the political temple, where either liberty must live or bear no life, they do not need, and would not brook, exterior control. The federal provisions under consideration are intended neither to impeach the spirit nor to invade the authority of the people in this respect. Were it otherwise, the Constitution would not have been ratified, or formed. That the States exacted this injury and insult to themselves is inconceivable. What, if we consider it, could be less admissible than the notion that proud Commonwealths, such as Massachusetts, South Carolina, Virginia, New York, hesitated to ratify the Constitution—for a time refused to ratify it—because it contained no provision prohibiting them from infringing the right of their own people to keep and bear arms; no provision prohibiting them from violating the right of their own people to be secure against unreasonable searches and seizures; no provision prohibiting them from depriving their own people of life, liberty, or property, without due process of law; and so on? The truth (historical and logical) is that the ten amendments adopted on the proposal of the first Congress have no bearing on the States in their relations to their own people. Those amendments bear solely on the federal government in its relations to the people. They prohibit the federal government from infringing the right of the people of a State to keep and bear arms, and the rest, but place no prohibition on the State itself, which they leave as they found it, free to regulate the personal rights of its own people as it thinks fit, within the limits of a republican form of government. They are checks on federal power, not abridgments of State power—barriers which the States have erected against the federal government, instead of shackles which they have riveted on themselves.

The view of these amendments here expressed is established, in my judgment, by the origin of the amendments; the avowed purpose for which they were proposed; the avowed motive with which they were ratified; the spirit of the whole Constitution which they amended; and even the first word of the first amendment, which, as the amendments were proposed with reference to each other, as

well as to the general defect they were designed to remedy, may be reasonably construed as supplying the subject, and fixing the bearing, of the prohibitions of all the rest, as it expressly does of the prohibitions of the first. Besides, the whole series of amendments proposed at the first session of the first Congress consisted of twelve, two of which were rejected, but the operation of both of which, like that of the first, fifth,\* sixth, and seventh amendments of the ten ratified, was restricted, expressly or impliedly, to the federal government; so that, out of the twelve amendments proposed by the first Congress at its first session, six referred by their own terms to the federal government only, throwing on those, who claim that the ten amendments adopted refer to the States in common with the federal government, the burden either of proving that the terms of one-half of the whole series did not mean what they expressed or implied, or of overcoming the presumption (not to mention more formidable presumptions) that the prohibitions of the other half, without internal signs, were intended to have the same sphere of operation as that indicated by the internal signs of the former half. I apprehend that neither is possible—neither nullifying the internal signs, nor rebutting the presumption they raise.

This view is opposed by nothing, I believe, except the mere applicability of the subject-matter of some of the amendments to the States, no less than to the federal government, which will hardly appear strange when it is remembered that the substance of all the amendments, and more substance to the same effect, had made part of the State Constitutions before the federal Constitution was thought of; and which at any rate, as just shown, is ruled by the presumption arising from the internal signs of the leading amendments. Authority, it is true, may be cited in opposition to the view; but authority, without reason, is nothing.

The attitude of the Territories and of the States towards the judiciary article of the Constitution, resuming the direct thread of my argument, is identical. So true is this that Congress, in the exercise of its power as the federal legislature, has divided the whole

---

\* The words in the fifth amendment, "except in cases arising in *the land or naval forces*, or in the militia, when in *actual service in time of war or public danger*," point unmistakably to the federal government as the exclusive subject of prohibition; as do the words in the sixth amendment, "trial by an impartial jury of *the State and District* wherein the crime shall have been committed;" and as do also in the seventh amendment the words, "no fact tried by a jury shall be otherwise re-examined in *any court of the United States*, than according to the rules of the common law."



country, States and Territories indistinguishably, into judicial districts, grouped into judicial circuits, without other geographical distinction, and without any political distinction, converting the Constitution, in the process of executing the judiciary article, into a palimpsest, as it were, from which State and Territorial lines are erased, to make room for judicial lines. The Territory of Alaska, for example, constitutes a judicial district, assigned to the ninth judicial circuit, which, besides the district of Alaska, consists of the districts of California, Oregon, and Nevada. And so with the other Territories. The majority of the States, it may be noted, are divided respectively into two or more judicial districts; and the President in his late annual message recommends that the Territory of Alaska, the most rudimentary of the Territories, shall be divided in like manner, in which event Pennsylvania and Alaska, next to the oldest State and the newest Territory, dropping equally their political divisions, will be equally resolved into a group of units of the judicial system. Moreover, the appellate jurisdiction of the Supreme Court extends to the judgments of Territorial courts, as well as to those of State courts, witness the Congressional act of 1891, and the case of *Coquitlam v. the United States*, lately decided by the Supreme Court, on an appeal under that act from the District Court of Alaska (the court of last resort in the Territory). For the administrative purposes of the federal judiciary, in short, the States and the Territories are one.

The Territories, therefore, are neither more nor less exempt from the judiciary article of the Constitution than the States are. Mr. Webster's argument, as usual in reasoning of this kind, proves too much. If it is valid, the States are not under the Constitution that unites them, or in the Union that they form.

In point of fact, the States are less under the Constitution than the Territories are; for the States, exercising their reserved powers, make their own Constitutions, while Congress, exercising the powers granted to it by the Constitution, makes all the laws (organic and otherwise) for the Territories, until it admits them as States into the Union. In our constitutional system a Territory is heir to the rights of a State. As a child, on attaining its majority, is entitled to the rights of manhood or womanhood, so under the Constitution a Territory, when qualified for self-government, is entitled to the rights of Statehood, which, during the Territorial condition, Congress holds in trust for the Territory, and exercises on its behalf, surrendering them intact on admitting it as a State. A Territory is constitutionally an infant State.

It is this organic relation between the Territory and the State, in connection with the function of Congress as the supreme authority of the Territory, fiducially speaking, which makes the Territorial judiciary, like the State judiciary, independent not of the Constitution, indeed, as Mr. Webster hastily inferred, but of the judiciary article of the Constitution, whose scope is exclusively federal. The argument, considering who made it, is an astounding misrepresentation of the facts. It is the more astounding, as the conclusion is a self-contradiction, that should at once have brought the search-light of reason on the process whereby it was reached. The constitution of a limited government, that should exclude from its provisions a part of the country under the political jurisdiction of the government, investing the government, as respects that part, with unlimited powers, would contradict itself, as well as the nature of sovereignty, one of whose properties is indivisibility. It would be not only a political monstrosity, but happily a political impossibility.

The key to the whole Territorial question, as I conceive, was supplied by the Opinion of the Supreme Court in the very case, as it happened, in which Mr. Webster employed professionally the argument that he revamped twenty years later, to meet the exigencies of the sudden debate in the Senate. In the *American Insurance Company v. Canter*, the court, referring to the Territories, and speaking by Chief Justice Marshall, said: "In legislating for them, Congress exercises the combined powers of the general and of a State government." The reason for this combination is not far to seek. It has already been suggested. The Constitution empowers Congress to govern the Territories, and eventually to admit them as States into the Union. These two provisions are virtually complementary of each other, the latter provision involving a definition of the powers conferred on Congress in the former.

As to this latter provision, it may be said, by the way, undue stress has been laid on the potential mode in the clause, "New States may be admitted by the Congress." *May* is here used not to grant a favor, but to impose a function in the exercise of which the public have the sole interest, and, hence, in accordance with a recognized rule of legal construction, has the value of *must*; it is not used permissively, but obligatorily. "New States may be admitted" does not mean in legal contemplation, therefore, that new States, qualified for admission, may be admitted or excluded, in the arbitrary discretion of Congress; it has the same legal effect, on the contrary, as if it read, "New States, lawfully constituted

within the limits of the United States, and qualified for self-government, shall be admitted." Such appears to be the just theory of the clause; to which Congress in practice has invariably conformed, overdoing rather than underdoing its duty in the premises. The clause unquestionably makes Congress the judge of the fact of qualification, and to this extent grants it discretion; but not further. When a Territory presents the evidences of its title to admission, and Congress cannot reasonably or honestly deny their sufficiency, it is constitutionally bound to admit the Territory; its power under the Constitution is henceforward ministerial. It has no greater right, constitutional or moral, to refuse to admit a qualified Territory into the Union, than a testamentary guardian has to refuse to surrender his guardianship when his ward comes of age. Whilst the one is a crime against the legal rights of the individual citizen, the other is a crime against the political rights of a great community of citizens.

The extraordinary powers, to resume, with which the Constitution invests Congress, as the political guardian of the Territory, in addition to its ordinary powers as the federal legislature, are measured by the powers which it surrenders to a Territory on admitting it as a State—are the powers of a State, that is to say. The Supreme Court describes them, not quite accurately, I think, as the powers of a "State government;" they are strictly, it seems to me, the powers of the State itself—of the people behind the State government, who make that government, and constitute the State. This same combination of powers, it may be mentioned, Congress exercises in legislating for the District of Columbia, and for the other places over which it is expressly granted the power of exclusive legislation, acquiring State powers over those places as the legal successor of the States that ceded them.

It is to be observed, respecting this combination, that Congress, in legislating for the Territories, exercises the powers of the general government not in legislating for a particular Territory, but for the Territories as a class, or as the property of the government, or as belonging in common with the States to the tract of country under the jurisdiction of the government. When Congress, in exercising its constitutional powers over the Territories, comes to the boundary of an individual Territory, it drops its powers as the national legislature, and enters clothed with those of a State only. As the national legislature, it legislates for the nation, not for a State, a Territory, or a District. As the supreme law-maker of a Territory, it makes laws for the Territory, not for the

nation, or any other body of people. Though Congress, no doubt, when exercising State powers in a Territory, may confer on the Territorial courts the jurisdiction of admiralty cases, and other cases of federal cognizance, it can do this only in cases in which the States may confer the same jurisdiction on their own courts—that is, in cases wherein the jurisdiction of the federal courts is concurrent, not exclusive. The remark of the Supreme Court in the *Canter* case, that a State court exercising admiralty jurisdiction must be established under the third article of the Constitution (the judiciary article), though a Territorial court exercising the like jurisdiction need not be, seems inconsistent not merely with the lawful scope of that article, but with what may be called by pre-eminence the *Canter dictum*, which immediately follows this remark in the decision. Curiously enough, the dictum, on a roundabout survey, appears not wholly to sanction the view which occasioned it, and which it was originally employed to justify. In the cases just mentioned, as previously intimated, an appeal lies from the judgments of the State or Territorial courts, through the inferior courts of the United States, to the Supreme Court; and, in regulating the exercise of this appellate jurisdiction, Congress resumes its primary character as the national legislature. • But as the supreme authority of an individual Territory, Congress exercises the powers of a State, and no other powers.

It is these powers, no greater, no less, of which the Constitution makes Congress the depositary during the minority of a Territory, and which under the Constitution Congress delivers up to the Territory on admitting it as a State. In this development of the dual character of Congress into a rounded principle, complete in itself, and universal in its application within the spheres of exclusive legislation, various conflicting expressions of the Supreme Court, it may be affirmed, are reconciled with its dictum in the *Canter* case, and with each other. The principle, thus developed, fixes the status of the Territories in our political system, if I mistake not, with scientific precision.

It follows from this principle that whatever a State may do or may not do within the sphere of its jurisdiction Congress may do or may not do in a Territory. As a State may establish its own judiciary to suit itself, Congress may establish a Territorial judiciary to suit its own conception of fitness; and in doing so it acts under the Constitution, not outside of it. The Territorial judiciary and the federal judiciary, to be sure, are independent of each other, except that in cases of federal cognizance an appeal lies from the

former (exactly as it lies from the State tribunals) to the latter ; but, though independent of each other, neither is independent of the Constitution, which provides for both.

The fundamental error of Mr. Webster's argument, as it appears to me, consists in his not recognizing the distinction, though placed under his eyes by the Supreme Court a score of years before, between Congress in its primary character as the federal legislature, and Congress in its secondary character as the supreme power of the Territories—the depositary of the rights of nascent States. Touch the argument with this distinction, ever so lightly, and the fabric of sophistry flies to pieces, like a Prince Rupert's drop.

If the authority of Congress over the Territories is derived from the Constitution, it may be asked, what limits does the Constitution impose on the authority? To begin with, all that Congress does in a Territory, if it would observe the letter and spirit of the Constitution, must be "needful," and must tend to qualify the Territory for Statehood, the constitutional destiny of every Territory. It of course must not infringe, directly or indirectly, any provision of the Constitution, express or implied. Specifically, the authority of Congress over the Territories, as combining the powers of the general government and of a State, is in reason limited by the constitutional prohibitions on both. That it is limited by the prohibitions on the general government, when Congress exercises the powers of the general government, will be conceded ; but that it must on a fair construction be limited also by the prohibitions on the States, when Congress in legislating for a Territory exercises the powers of a State, appears not only from the fact that the powers exercised in thus legislating are State powers, uncombined with the powers of the general government, but from the fact that, if free in this case from the prohibitions on the States, the authority of Congress in a Territory would exceed the powers which Congress delivers to the Territory on its admission into the Union. The powers of the trustee in possession cannot be greater than the powers of the legal and beneficial owner when he comes into possession. The guardian can have no power to do for his ward what his ward can have no power to do for himself on coming of age.

If Congress, in the exercise of its power of exclusive legislation over a Territory, could on behalf of the Territory emit bills of credit, pass a law impairing the obligation of contracts, enter into an agreement with a foreign power, or do any of the other things prohibited to the States but not to the United States, the Territory, acting by its constitutional agent, would exercise greater powers

than it would have when admitted as a State—the inchoate State, in power and dignity, would surpass the complete or definitive State; which is contrary to reason. The abeyant rights of a Territory, which Congress holds as its guardian, and yields to it on admitting it into the Union, can rightfully neither go beyond nor fall short of the rights of the Territory when it becomes a State. If they did either, how could Congress, as their constitutional depositary, account for the excess or the deficiency? It would have to confess itself either a usurper or a defaulter.

The power of Congress over the Territories is thus not unlimited. There are in our government no unlimited powers. A limited government having unlimited powers is a contradiction in terms. Next to the power of amendment, the power least limited in our government is the treaty-making power; but the treaty-making power is far from being unlimited. It is limited by the fundamental principles of the government; by the form of the government; by the distribution of the powers of the government; and by express provisions of the Constitution. For example, a treaty would be void that undertook to dissolve the Union; to change the government into a monarchy; to vest the judicial power of the United States in Congress or the legislative power in the President; to amend the Constitution in any particular without regard to the mode of amendment prescribed by the instrument itself; to deprive a State, without its consent, of its equal suffrage in the Senate; or to establish slavery within the United States. A treaty is valid when made “under the authority of the United States,” not otherwise; and “the authority of the United States” is derived from the Constitution, and cannot be invoked by violating it. In this republic, in fine, the ægis of the Constitution covers everything. No Territory of the United States, near or remote, can escape the Constitution; any more than a man can outrun his shadow. Our government is purely a government of law. Extra-constitutionality is unconstitutionality.

A seeming anomaly in practice may be thought to mar the theoretical symmetry of our system. What if an infant State, it may be said, prove permanently incapable of self-government? In that case, assuming the Territory to be a permanent possession, there would be no choice but to keep it permanently in the Territorial condition. The principle is that a Territory qualified for self-government is entitled to admission as a State. This principle holds good in all cases; though in cases conceivable, if not confronting us, the attempt fully to realize it might stretch

out to the crack of doom. But that is not the fault of the principle. Anyway, we must fight the course. There seems no alternative, as things now are. If we have been so unfortunate or unwise as to introduce into our national household a political incorrigible or set of political incorrigibles, we shall have to pay the penalty, by taking up "the white man's burden," and bearing it as we may in subordination to the Constitution, ready to fight it out on that line, in default of a better, if it takes all time. Meanwhile, we are not bound, morally or constitutionally, to shut our eyes to any fair chance of throwing off the burden, without injury to ourselves or to its contents. In the event of meeting with such a chance, or of bringing it to pass, the treaty-making power, exercised in negotiating a treaty of independence, or even of cession, might open the door of honorable relief from a situation become intolerable to us, without any countervailing benefit to the Old Man of the Sea lashed on our shoulders by treaty, and pinned to them by bayonets. This is a constitutional possibility. One other resource there is. Should we find it impracticable to manage our Territorial incorrigibles, commercially or politically, under the Constitution as it stands, and be willing to adapt our free institutions to barbarians sooner than relinquish the endeavor to adapt barbarians to them, we are at liberty to alter the Constitution in the mode it prescribes. But we are not at liberty, let us bear in mind, to alter it by usurpation. As for undelegated rights of sovereignty (what are called "inherent rights"), it is the chief object of this article to accentuate the fact that in a government of enumerated powers such rights can have no existence. Whatever we do, or refrain from doing, now or hereafter, it behooves us to remember that we owe our first duty to ourselves, including those institutions in which are enshrined our own hopes, and the hopes of mankind. The unfading counsel of Polonius is as apt for nations as for individuals:

"This above all, To thine ownself be true;  
And it must follow, as the night the day,  
Thou canst not then be false to any man."

PAUL R. SHIPMAN.

## HOW GREAT BRITAIN GOVERNS HER COLONIES.

---

"They went out on the footing of equality with, not of slavery to, those who were left behind."—*Thucydides*.

---

The peculiar interest which attaches to the study of the Colonial Empire of Great Britain at the present time arises out of three considerations. First, because it is the most extensive and successful system of colonization the world has seen ; second, because the prestige which it has brought to the British nation is being seriously menaced by the reversals now being sustained by British arms in South Africa ; and, third, because the United States have recently acquired possessions, some of which are so far removed from our shores and are surrounded by such climatic, social, racial and religious conditions that they will have to be treated, for a time at least, as dependencies, before they can be incorporated into the Federal Union.

The record of the Colonial Empire of Great Britain is a wonderful record ; a tale of peace and war, of change, of enlargement, of unparalleled growth. We are precluded by the limits of this article from reviewing this record and by our natural limitations from divining the secret of its wonderful success, and we shall not undertake to do either. But before describing the political machinery used in the administration of this system it will perhaps be interesting to note some of the agencies which have made the Empire possible and which contribute to its strength and perpetuity.

Nature fortunately gave to England such obvious boundaries, that it has been spared the perpetual melting down and recasting processes to which the countries of Continental Europe have been subjected. Her fortresses are the works of nature. She is literally

"Neptune's park, ribbed and paled in  
With rocks unscalable and roaring waters."

This natural advantage has served not only to "coop from other lands her islanders," but also to prevent wrong-headed rulers from trying to enlarge her boundaries by annexing the lands of their neighbors on the Continent. Strong, healthy nations, like healthy



individuals, must grow. This can be done in two ways—either by taking possession of adjacent lands or of distant parts of the world. England has been debarred from the first method by nature and hence has devoted her energies to colonizing lands beyond the seas.

Four causes have contributed largely to the success of this enterprise—two of which might be termed mechanical or scientific, and two administrative or historical. The scientific agencies referred to are the improved methods of applying steam to transportation and the use of electricity in transmitting intelligence under the sea as well over the land. These forces, by practically annihilating space and time, have brought about conditions without which neither the commercial and financial activity nor the political life of the Empire could exist. The failure of the Empires of antiquity was often due to the fact that they were unable to overcome these physical conditions which lay in the way of vigorous and effective administration of possessions lying at a great distance from the seat of government. Aristotle estimated that one hundred thousand freemen were too many for a single state, yet Great Britain rules a single dependency of two hundred and fifty millions of inhabitants, distant thousands of miles from her shores. Steam and electricity are the natural enemies of ignorance, prejudice and provincialism. They spread democracy and learning. You will recall that they have only been effective as world agencies during the last fifty years. The first submarine cable between England and America was not successfully laid until 1866. The ships that carried the first settlers to Australia took eight months on the voyage, whereas now the trip can be made in less than six weeks. Burke expatiated at length upon the effect remoteness had upon administration. In his time it took six weeks to reach the American Colonies. "Three thousand miles of ocean," says he, "lies between you and them. You cannot pump this dry. No contrivance can prevent the effect of this distance in weakening government. Months pass between the order and execution. Who are you that you should fret and rage and bite the chains of nature?" While Burke was perhaps the most profound statesman that ever lived, he caught no glimpses of what the future had in store in the way of scientific invention. For purposes of administration the ocean has been pumped dry and the chains of nature burst asunder. Man has conquered nature with nature. The storm cloud and raging billow have no terrors for him. He makes the lightning of the one minister to his needs and laughs at the fury of the other, as his leviathan of steel and steam gathers speed by churning it into foam. Now the execution follows swift

on the heels of the order and the ocean is crossed in as many days as it then required weeks.

The two administrative or historical facts which have played such an important part in the growth of the Empire are the repeal of the Corn Laws by the British parliament in 1849, and the loss of her American Colonies in 1783—the former making Great Britain a free trade nation, and the latter teaching her the necessity for granting local self-government to those Colonies where the English speaking people predominated. The growth of the doctrine of free trade and the principle of independent government in the English speaking Colonies went hand in hand. At the time when British statesmen were inclining themselves to give free institutions to the Colonies, the doctrine of free trade was becoming a fundamental principle of British politics at home, and its application fundamentally modified the relations between the Mother Country and the Colonies. In early times it was never doubted that the Mother Country should enjoy a monopoly of the trade of her Colonies. Now she has no preference in their markets unless they choose to give it to her, for each Colony frames its own tariff, and may impose what duties it pleases on the export of the Mother Country or of other Colonies. Sixty years ago, when English statesmen were confronted with the problem of how to govern their great dependencies, Canada and Australia, they had before them two significant facts; the places were so far removed from home that great difficulty would attend their management, and that English people predominated among their inhabitants. Experience taught them that English Colonies had thriven under self-government, and that the greatest of them were lost forever by the action of the Mother Country in imposing taxes on the Colonists instead of leaving them to tax themselves.

They saw that they must incur one of two dangers; either by giving self-government they must run the risk of peaceful separation, or by refusing it they must run the risk of a second war of Colonial independence. They wisely chose the former alternative. They rule with a loose rein that they may rule at all, and the present force and vigor of their authority is derived from a prudent relaxation of authority. The fallacy in trying to keep a Colony of Englishmen in subjection was pointed out by Burke during the conflict with the American Colonies. He stated the gist and philosophy of the whole matter in his speech on "Conciliation with America," when he said, "An Englishman is the unfittest person on earth to argue another Englishman into slavery." The ignoring

of this doctrine at the time and the subsequent adoption of it is another instance of "The stone which the builders rejected, the same has become the head of the corner." This principle is now the chief corner stone of the Colonial Empire of Great Britain.

When we consider the vastness of the Empire, that it lies on "the scattered fringe of many oceans," and embraces every zone and parts of every continent, that it numbers among its inhabitants representatives of every known race and types of every form of civilization, from the lowest to the highest, from the oldest to the youngest—the Hottentot and the Englishman—civilizations whose origin is lost in the twilight of history and civilizations springing full panoplied from the forefront of the present—that it deals with religions of every form, and institutions of every character, and that it controls all the great highways of the seas, we are amazed and naturally wonder and inquire how is all this done? What methods are adopted? What political alchemy has the people of this little isle discovered which enables them to stretch their scepter to the four corners of the earth, and hold in their hands the destiny of such a large portion of mankind?

The answer to this is that the machinery of government in some instances is simple, in others complex. There is no hard and fast rule. The system in use is noted for its variety and flexibility of rules. It is not attempted to govern Canada and Basutoland in the same manner. The English never commit the folly of making a set of ideal laws and then undertaking to make their Colonies conform to it. They realize that the law under which a people live is the natural expression and product of their intellectual and moral and social gifts and habits, whence it follows that communities representing different types of life require different sets of laws. An examination of the situation discloses the fact that the Colonies of the Empire are distinguishable into two or three general classes. The classification may be grounded on climate, or on racial distinction, or on the form of government used. While we are interested in making the classification according to the form of government in use, it will be observed that, in so doing, the same lines will be drawn that would be drawn were the classification based on race or climate—that is to say, the form of administration adopted is determined by the race of people which inhabit the Colony, and the race of people in the Colony is determined by the climatic zone in which the Colony is located. For example, the temperate Colonies are the natural homes of the European races and have been now completely occupied by those races. These Colonies being peopled

by men accustomed to constitutional governments at home, are capable of receiving and working institutions similar to those under which they formerly lived. Naturally they carry these institutions with them to the new country. The American Colonies reproduced English institutions and English law. The same thing has taken place in Canada, Australia and New Zealand. This is not true of the tropical Colonies. In them the incoming races are forbidden by the heat, not only to support open air labor, but also to retain their original robustness of mind and body. Such countries are Central Africa, British India, Borneo and the Philippine Islands. Here we find few European immigrants, an enormous native colored population and a very low type of civilization. So in these racial and climatic conditions we have the basis of our classification as regards the form of government used. Recognizing these distinctions, Great Britain has long since made it a maxim of British policy that every Colony where the English race constitutes the bulk of the population, ought from the first to receive local self-government, and ought to have an elective legislature and a ministry responsible thereto, as soon as the citizens have become numerous enough to work such a system. This rule applies to Colonies settled in the main by Englishmen, and they are classified as *Responsible Governments*. On the other hand, wherever the majority of the population are of another race, whether negroes, Asiatics or Polynesians, it follows that they can not be trusted with self-government. They are intrusted with only such power as they are capable of exercising safely and are usually governed despotically, and are classified as *Crown Colonies*.

The machinery of government at home is about as follows: The whole system is placed in charge of the Colonial Office, which is under the control and supervision of the Secretary of State for the Colonies. He is supplemented by a corps of assistants who are selected by competitive examination and without any regard to party affiliations. The Secretary himself being a member of the cabinet, is, of course, a party man.

The Colonial Office is the repository of the experience and traditions of several generations, and has accumulated a stock of precedents and a mass of special knowledge regarding the history and conditions of each Colony of the greatest utility for practical purposes. It knows the character, aptitude and record of every important official in the service, and is able to give due weight to his utterances and his policies. It must be borne in mind that there is but little work done in the home office for the Responsible Govern-

ments. Its chief business is to nominate a Governor to act as the local representative of the Crown. In Canada, the Home Government, instead of nominating the Governor of each Colony, nominates a Governor-General for the Dominion, and he in turn nominates the Lieutenant-Governors of the several provinces. For each of the Australian Colonies and for Cape Colony, the Home Government nominates a special Governor.

In general outline the machinery of government existing in the various Colonies is the same, but in its practical workings there is a vast difference. It consists of a Governor sent out by the Home Government, an Executive Council and a legislative body. The functions of the Council and Legislature vary as we pass from the Responsible Government to the lowest form of the Crown Colonies. In the Responsible Governments the Executive Council is nominated by a majority of the legislature and practically corresponds to the Cabinet in the Home Government. These Governments have their exact prototype in the Home Government with its parliament and cabinet and nominal executive. But it is quite different with the Crown Colonists. In all of these there is a Government from home, the power of which is in the last resort absolute. But in many there are also local legislative councils. In some these councils are nominated by the Crown, a scheme which indirectly checks the Governor by requiring him to listen to advice before he acts, though his advisors have no weight of representative authority behind them. In others the councils are partly nominated, partly elective. In most of the Colonies the Crown has reserved the right to legislate, by means of what is called an order in council, over the head of the local legislative council. There are a few Colonies in which there is no local council at all. In all of these Crown Colonies the supreme authority has been concentrated in the hands of a Minister in London and his lieutenant, the local Colonial Governor.

India is an Empire in itself, and though of the nature of a Crown Colony, it is under a separate management, which together with its unique position in the Empire entitles it to a separate consideration. The administration of British India is the most gigantic task ever attempted by a nation in the history of the world. The Roman Empire was larger in area, the Chinese Empire may be larger in population, but in neither case do we find a ruling race composed of foreigners whose home is beyond the sea.

British India is divided into eight great provinces, and these are sub-divided into two hundred and forty-five districts. The district is the unit of administration and corresponds to the English Shire.

The present form of government of the Indian Empire was established by the Government of India Act (21 and 22 Vict. Cap. 106), whereby all the territories formerly under the government of the East India Company were vested in Her Majesty. Under the provisions of the Royal Titles Act passed in 1876 (39 and 40 Vict. Cap. 10), Queen Victoria was proclaimed Empress of India at Delhi before the princes and high dignitaries of India, January 1, 1877.

The administration of the Empire in England is intrusted to the Secretary of State for India, assisted by a council of not less than ten members, nine of whom have served or resided ten years in India, and have not left India more than ten years previous to the date of appointment. The administrative machinery in India consists of a Viceroy, who in theory represents the Queen-Empress, but who in reality is subordinate to the Secretary of State, and two councils, which owe their existence to a series of acts of parliament. One of these councils is executive, and the other legislative. The Viceroy is required to act in all cases through his council.

The executive council is composed of six ordinary members, with the commander-in-chief as an extraordinary member, who are all appointed by the Secretary at home. In certain respects it may be compared with the English Cabinet. The legislative council is composed of the preceding, together with from six to twelve additional members for making laws and regulations. They are appointed by the Viceroy from among high officials, other English residents, and prominent representatives from the native community.

While the whole tendency of constitutional progress in England has been to impose limitations on the power of the Executive, the whole tendency of administrative development in India has been to increase the authority of the Executive. Though the work of Great Britain in India is not yet finished, it has already yielded great results.

"It has established perfect internal peace and security through a vast area, much of which is still inhabited by wild tribes.

"It has secured a perfectly just administration of laws, civil as well as criminal, between all races and castes.

"And it has imbued its officials that their first duty is to do their best for the welfare of the natives, and to defend them against the rapacity of European adventurers."<sup>1</sup>

Its work has been equally beneficial in the other Colonies.

---

<sup>1</sup> James Bryce.

Thus have we traced in brief, but dim outline, some of the policies, and enumerated some of the agencies which have been used in establishing and maintaining the great Empire, which, sixty years ago, was eloquently described by Daniel Webster as "a power to which Rome in the height of her glory is not to be compared—"a power which has dotted over the surface of the whole globe with her possessions and military posts, whose morning drum-beat, following the sun and keeping company with the hours, circles the earth with one continuous and unbroken strain of the martial airs of England."

LEBBEUS R. WILFLEY.

## THE PHILIPPINES.\*

It has been said that we like big things in this country, and we have gotten in the Orient a big archipelago. If you draw a line from Formosa down to the middle of Borneo, then another line from the same point in Formosa at an angle of 45 degrees, you would have a triangle which embraces our new archipelago. That triangle will lie through 17 degrees of latitude, from  $21\frac{1}{2}$  down to  $4\frac{1}{2}$ , and at its broadest point will extend over 10 degrees of longitude. Or if you take a map of Europe made on the same scale, and put the North of Scotland on the apex of this triangle, then the toe of Italy will fall on its base, and all Europe will lie within it in its north and south directions. The upper part of that triangle is occupied by the largest of the islands of the archipelago—Luzon, 40,000 square miles. The middle section of the triangle contains the Visayan Islands, lying south of Luzon, and which we are now beginning to know as the islands of Panay, Negras, Cebu, Samar, Leyte, etc. Towards the base of the triangle are the Sulu archipelago and the island of Mindanao. These islands together make about 120,000 square miles of area. The mountains in these islands run from north to south. From Sulu you can look out toward the setting sun and see a mountain range of 4,000 feet; behind you there are mountains; down in Mindanao, where this mountain range terminates, they are 10,000 to 11,000 feet high. The archipelago raises hemp, rice, coffee and pepper, and is the land of the caribou, which answers all purposes of transportation. There is a tree there called the Nara, out of which they make tables and fine furniture. This land became known to Europeans in the early part of the Sixteenth century. In 1521 Magellan landed in the northern part of Mindoro and sailed northward to the island of Luzon, where some 700 of the natives were baptized. Another Spanish expedition went out in 1565, accompanied by a band of Augustinian brothers, and once more compelled the natives to swear allegiance to the Spanish Crown, and from that day to this the secular and religious powers have worked hand in hand for the subjugation of the Philippine archipelago.

As to the people, I suppose it would be accurate to say that when the first Spaniards went there, they were fairly comparable

---

\* An address delivered before the Yale Phi Beta Kappa Society, February, 1900. Stenographer's report, revised by President Schurman's Secretary.



with the Indians of North America, and it is a great credit to Spain that, however much in recent years she may have misgoverned them, she addressed herself to the conversion of those people and the spread of civilization among them. Out of the 8,000,000 people inhabiting the archipelago, 6,500,000 are civilized and Christianized. Their Christianity is of the Roman Catholic type, and their civilization, of course, would not rank with the highest type of civilization in Europe and America, but it has nevertheless sufficiently developed to mark it off distinctly from barbarism.

There is a great medley of people. Matthew Arnold in his letters complained of the monotony of American life; we look alike, think alike, read the same newspapers, our cities are built in the same way, and the very streets are named by numbers. If there has been uniformity in our life in the past, believe me that in the political world we shall have variety now. You have in the Philippine Islands three great races and eighty-four known tribes. The three great races are the Negritos, Indonesians and Malaysians. The Negritos are the oldest inhabitants. Their homes to-day are on the slopes and mountain sides of Luzon, Mindoro, Panay and Negros. They live on tubers and such game as they can bring down with their poisoned arrows. They are fast disappearing and number not more than 25,000. Their death rate is said to be greater than their birth rate. They stand at the bottom of the scale among the peoples. They are short of stature, have closely curled hair, flat noses, thick lips, black skin and awkward, clumsy feet. Their intelligence is also of the lowest order, and as they are fast disappearing, I don't suppose they will cause serious problems in the future. The next in the scale are the Indonesians, numbering about half a million. They are uneducated and live for the most part in the island of Mindanao, which never felt the influence of Spanish civilization. Naturally they seem to be people of great intelligence. I saw a specimen of this tribe—a fine fellow, 19 years of age, five feet, nine or ten inches in height, light color, aquiline nose, almost classic lips and chin—a perfect type of physical manhood. The Malaysians are by far the most numerous of the peoples. There are forty-seven tribes, speaking different dialects which are unintelligible to each other. Some eight or nine civilized tribes constitute the bulk of the Malaysian population. These are the Visayans, numbering two and a half millions; the Tagalogs, numbering one and a half million; the Vicolos, five hundred thousand; the Pampangos and Pangasinanes, each three hundred thousand to four hundred thousand; the Ilocanos, over four hundred thousand; and the Cagayanes, nearly

two hundred thousand. All these are civilized and Christianized; and to them we must add the civilized and Mohammedanized Moros, about three hundred thousand. You hear a good deal in certain quarters of the Filipino people and nation. There is no such nation or people. What you have is an assemblage of different peoples and tribes, speaking languages which are unintelligible to one another.

It would not be fair to gauge the Philippines by what you see in Manila, because Manila is a great cosmopolitan city. They have a considerable sprinkling of half-breeds, and representatives of European peoples—English, German, Swiss. The civilization of the archipelago is not fairly expressed in the city of Manila. Rather, would I take one of the southern towns or villages, far away from Manila, where the people have worked out their civilization under local conditions, and without any assistance from European peoples. In the remote town of Silay, in the northern end of Negros, I met a number of Filipino gentlemen with whom I spent an hour or so, and I assure you I was surprised at the degree of intelligence which I found among all the people who met me. There was an artist who had painted a picture of Liberty—the United States breaking the chain of the Filipino. I talked with him about the condition of the islands, and we then attended a banquet, where those men made as good speeches as we hear at banquets at home; perhaps not so many witticisms, but as much solid matter and vastly more earnestness.

I was the first official who landed on the Sulu Islands. I saw the Sultan, and told him that we had come into possession of Spain's rights in the Sulu archipelago, and proposed to enforce them. He told me that he had been at war with Spain for generations and had been successful, and that Spain annually paid tribute to him. I told him that our attitude was pacific, and that I was sure it would be to his own interest to accept American sovereignty, and he reciprocated those sentiments.

During all the long period of Spanish occupation of the Philippines, the internal affairs of the Sulus remained absolutely in the hands of their chieftain. Spanish jurisdiction was merely an external one. They managed their own local affairs in their own way. We, having accepted Spain's sovereignty, had no more rights than she had among the Sulus.

I cannot explain the nature of the work which confronts us unless you bear in mind that there are two entirely different social and political conditions in the Philippine archipelago. The people of

Luzon and the Visayans belong to one, the southern tier of islands to the other. The latter represent the stage of political evolution which the Filipinos had reached when the Spanish got there. In the southern tier there are native Sultans and the institution of hereditary sovereignty, and the people are accustomed to the sway of their rulers. On the northern islands, all Filipino potentates and dignitaries standing between the mass of the people and the Spanish overlords have disappeared. You simply have the mass of people with natural leaders to whom they look up. You have, in short, an absolute democracy as complete as that in the United States. In Spanish days, over this uniform level of Filipino people, there was a Spanish Captain-General, but with his disappearance no other sovereign remained throughout the island of Luzon and the Visayan Islands. Consequently, in adapting a form of government to the archipelago you must take account of these varying conditions. We must adapt our government to the people. A scheme of government which can easily be adapted to the southern tier of islands is that which Sir William Clark, with such eminent success, put in operation in the Malay peninsula. He entered into agreements with the Sultans of the States to the effect that he would supply them with advisors, whose advice they were under obligation to accept, and that he would control the receipts and expenditures of their respective States, and he told them that, with these simple changes, the Sultans would find themselves vastly more prosperous than ever before. Any one who has studied the wonderful history of the Malay archipelago will find his promise fulfilled. We can make agreements with the chieftains of the southern tier, by which we shall take charge of the custom houses, and they will accept advisors who will bring to bear upon them not the power of the sword, but the American sense of justice, the American sense of government, and capacity for ushering in prosperity. Thus these islands in course of time can be lifted as high above the condition they are now in as the northern islands have been since the year 1813. Those who recommend this policy seem to think it applicable to the whole territory, but no protectorate can succeed, no agreement with the head of a State can be made unless that head is a permanent head. How could a government like the United States make an agreement with the head of a State which to-morrow may be down? How could we make an agreement with Aguinaldo? The Tagalogs are only one tribe and not the largest tribe. We could not make an agreement analagous with the agreement we have made with the hereditary ruler of the Sulu archipelago. Sentiments of

loyalty surround his throne, his people expect arbitrary rule, what he promises he has power to perform. Aguinaldo, the creature of a military dictatorship, may be up to-day and down to-morrow. While the people are attached to him, they have no feeling for the dictator like that the Sulus have for their hereditary chieftain. We have to govern in the northern part because the conditions are different. Now what shall we do? There are those who say that we cannot do much of anything. Others that the Constitution settles all. I am not pessimistic nor disappointed. We can do a great deal. Though I am not a lawyer, I do not believe that the Constitution applies to either the Philippine Islands or any other territory. The benefits of the Constitution will be enjoyed by the peoples of outside lands when the Congress of the United States applies them. Assuming that we have power to do as we will, assuming that the Constitution does not apply to the Philippine Islands, then what shall we do to solve the problem? The first thing to do is to find out what the people want. We must adapt our government to the Filipinos. No matter how benevolent our desires may be, if the benevolence does not run in those channels which are congenial to the Filipino peoples, it will prove a failure. We made an honest and strenuous attempt to ascertain the ideals, sentiments, and prejudices of the Filipino people, and when our report is published, something I think will be clear which no one would expect to read; namely, that the form of government recommended by the commission is substantially that which the best Filipinos themselves desire. We ascertained the views of the Filipinos not by intercourse with those of Manila and elsewhere, but by asking the most eminent Filipinos to submit memoranda to us, and to draw up an ideal constitution from their own point of view. The most encouraging thing in my experience is the marvelous coincidence which obtains between their ideals and aspirations on the one hand and the traditions, practice and institutions of this Republic on the other. What the best Filipinos want is exactly what the best Americans want to give them, what any set of administrators sent there would most desire to confer upon them. It is the old American story; absolute religious liberty, civil liberties, and all the political franchises they are capable of exercising. It is not independence. There are good and intelligent people, who rank among the best of our citizens, who are commiserating the Filipinos because deprived of their independence. There can be no greater fallacy. The Filipinos did not go to war with Spain in order to win their independence—*independence* never entered into their programme. Here is their programme—a pro-

gramme first published in Manila in 1897, one year after the insurrection had been in full blast.

(1) Expulsion of the friars and restitution to the townships of the lands they have appropriated.

(2) Spain must concede to us, as she has to Cuba, parliamentary representation, freedom of the press, toleration of all religious sects.

(3) Equality of treatment between Insular and Peninsular civil servants.

(4) Restitution of all lands appropriated by the friars to the original owners, or to townships which shall sell them in small holdings to individual purchasers.

(5) Abolish the government's power to banish citizens, as well as unjust measures against Filipinos.

(6) Legal equality of all persons under the civil and penal code.

This is a list of grievances, a demand for reform subject to the sovereignty of Spain. In dealing with the political problem we must endeavor to give the Filipino people what they want. They do not want independence. The best of them say that it is actually impossible. So far as the first two points are concerned, it is inconceivable that our government should not establish civil and religious liberty. Complete self-government would be a calamity. The Filipinos are not capable of governing themselves. What experience have they had under the grinding tyranny of Spain's rule, with no opportunity to govern themselves except in their local affairs?

We can give what they are capable of exercising; that is, municipal and county home rule. Turn their provinces into counties, do away with provincial governments, set up town government as in the United States, with one proviso. They cannot conceive of local self-government without supervision from Manila, without intervention on the part of the central government, and while the Filipinos insist on county government, they need an American supervisor to see that good advice is accepted. That provision is contained in the constitution of the Filipino Republic, which has served as a model. Our main purpose with the Filipinos should be to give them what they want—municipal and county home rule under the supervision and control of the central government at Manila.

The central government should consist of a lower branch of the Legislature elected by themselves on a property and educational qualification, a Senate, half elected by them and half nominated by the President, and a group of their best men, including the Chief Justice. If we retain the right of naming a Governor, and also have the right to name half the Senate, they retain more real freedom,

more real self-government, than they ever dreamed of when they took up arms against Spain.

It is not an easy task, but I do not think it is an insoluble one. There are of course difficulties which anybody can point out. We have not been in the colonizing business; all sorts of new responsibilities have come upon us. There are certain specific circumstances to which I would like to call your attention.

(1) The fact to which I have referred, of the natural harmony which exists between our own traditions and the Filipino aspirations. (2) The masses of the people are densely ignorant and superstitious. In Massachusetts there is one teacher for every 169 of the population, in the Philippines there is one teacher for every 4,000. But most of the people hunger and thirst after knowledge. Somehow they have in them a persuasion that knowledge is power. The example of Japan is before them as a model. While these people are ignorant, their yearning for knowledge, their devotion to it, their readiness to tax themselves to maintain schools, is an exceedingly hopeful factor. (3) You have a sprinkling of educated men all over the archipelago, educated in the Jesuit college at Manila, or in the University of Manila. I was not anywhere where I did not meet a few educated men. We have got to satisfy the educated minority, have got to ascertain their ideals, and give them the freedom of government they think adapted to the people, and by doing that, by winning their support and utilizing their ambition, they will carry with them the mass of the people, and the problem of government will be a comparatively simple one.

The financial question and the trained civil service are important. The Philippine Islands supported the Filipino government 300 years, and spent, out of \$16,000,000 a year, \$4,000,000 for an army they did not need, \$2,500,000 for a navy which was a mockery, \$1,500,000 on a colonial department. If a country which has money enough to fling about in that fashion cannot support itself and maintain all the legitimate branches of a Filipino government under American sovereignty, then you have the most astounding wonder we have met with in our history. They have resources; there are public lands there in the mountain districts, which will become valuable when highways and railroads are built.

As to the trained civil service, we have not one like the English. But England had not either when she began to govern Asiatic peoples. We will have to make ours, and we have the great advantage of the history of England's experience, its failures and successes, as a warning, guidance and encouragement. I think you may

trust the Yankee to work out the scheme of civil service. We shall not need a large number of men out there. Only a small number of Americans will be needed with the offices mainly in the hands of the Filipinos,—four or five score will be sufficient. India has 300,000,000 of people and 1,500,000 square miles, or, excluding the Feudatory States, 230,000,000 people and 1,000,000 square miles. They have only one English civil official for every 230,000 people, or 1,000 in all. We shall not need an army of civil servants. We may trust the government to send the right men, because, while both political parties insist that we must change our public men every four years in this country, they agree that when we come to deal with the Filipinos it is a different proposition, and we have got to select the best men and retain them in office, because our capacity to govern an Asiatic nation is on trial, and the result one way or the other is going to be of tremendous significance for our reputation. I am willing to confess that I have more anxiety on that one point than on any other. If all doubt be removed there and we send out the right class of administrators, the problem of governing the islands, while perhaps a difficult one, will be more easy than the majority of American people believe. There are some Yankees who think that we can take anything we can lay hands on, but we shall fail if we introduce any such conception into our government.

If we think of these islands mainly as a responsibility which has devolved upon us as a result of our war with Spain, and if we imagine that our mission is to lift these people intellectually, morally and mentally, then I am sure there will be no mistake about the kind of government we shall give them, and the American flag, which throughout all the Orient is the symbol of irresistible power, will then be an emblem of freedom and star of hope to all the oppressed nations of the world.

JACOB G. SCHURMAN.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,  
ROBERT H. GOULD,  
LESLIE E. HUBBARD,

WARREN B. JOHNSON,  
ARCHIBALD W. POWELL,  
GEORGE ZAHM.

## Associate Editors:

M. TOSCAN BENNETT,  
JOHN HILLARD,  
WILLIAM H. JACKSON,  
CORNELIUS P. KITCHEL,

GEORGE A. MARVIN,  
ROBERT L. MUNGER,  
HENRY H. TOWNSEND,  
THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1342, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

## EXTENT OF JUDICIAL POWER—INTERFERENCE WITH EXECUTIVE POWER.

The decision in the recent case of *La Abra Silver Mining Company v. United States*, 20 Sup.Ct. Rep. 168, finally determines a question which has been the source of no little diplomatic correspondence between the executive and legislative departments of our government during the past quarter of the century, and presenting one of the most outrageous claims ever worked through Congress.

The questions involved in this case arose from a claim made by the La Abra Silver Mining Company, a New York corporation, for damages alleged to have been sustained in consequence of certain acts and omissions of duty upon the part of official representatives of the Republic of Mexico. Pursuant to a convention between the United States and the Republic of Mexico, concluded in 1868, this claim was submitted to a commission of two for investigation. They, failing to agree, appointed an umpire, as provided by the terms of this convention, who made an award of close on to seven hundred thousand dollars in favor of the mining company. An application was made to the umpire by the Government of



Mexico for a rehearing of the case, but it was denied. Subsequently, the Mexican Government, without at all disputing its obligations under the convention of 1868—making such an award final—placed in the possession of the Secretary of State of the United States, certain books, documents and papers which it alleged had been then recently discovered and would show that the La Abra Company was not only fictitious and fraudulent, but had been supported by false and perjured testimony. At that time a large part of the sum awarded to the company had been paid by Mexico and was in the hands of the Secretary of State.

The President being of opinion that certain legislation was necessary as to the manner of making payments to the individual claimants, the matter was submitted to Congress. An act was passed, one portion of which directed the President to investigate the charges of fraud, and empowered him to withhold the funds, should he be of the opinion that the case ought to be retired. The Secretary of State subsequently made an investigation, and, after a thorough examination of the newly-discovered evidence, reported to the President that, "while the nature of the case did not justify or demand a retrial of the claims by a new international tribunal, the honor of the United States required that the case should be further investigated by the United States to ascertain whether this government had been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud; that if further investigation should remove the doubts, the honor of the United States would have been completely maintained, but if, on the other hand, the claimant should fail in removing these doubts, or if they should be replaced by certain condemnation, the honor of the United States would be vindicated by such measures as might then be dictated; and that as the Executive had not the means of instituting and pursuing the investigation, the subject should be referred to Congress for its action." Congress failed to make any provision, and after it adjourned in the summer of 1880, payment to the La Abra claimant of the installments received from Mexico, were begun by Executive order. This proceeded until the Arthur Administration, at which time further distribution was suspended because of the negotiation of a treaty between the United States and Mexico for a re-examination of the case. This treaty was signed in 1882 and was submitted to the Senate for its approval, but was rejected by that body. While this treaty was before the Senate mandamus proceedings were brought to compel the Secretary of State to distribute the installments which had been

withheld. The suit went to the Supreme Court on appeal and was dismissed by that tribunal. *Frelinghuysen v. Key*, 110 U. S. 63. After the rejection of the treaty, and after repeated recommendations to Congress by the Executive Department, an act was finally passed in 1892 conferring full jurisdiction over the matter upon the Court of Claims, with right of appeal to the Supreme Court of the United States, and authorizing the Attorney-General to bring suits in the name of the United States to determine whether the original award was obtained by fraud. The La Abra Company demurred to the bill brought for this purpose, the main ground being that the questions involved were of a diplomatic or political nature, and that under the Constitution of the United States the subject-matter of this suit was within the final and exclusive control of the Executive Department of the government and not within the jurisdiction of any judicial tribunal.

Article III, Section 2, of the Constitution provides for the extent of the judicial power, and declares that the same shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, etc. This article confines the judicial power to a "case in law or equity," in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given in the Constitution.

Chief Justice Marshall, in the case of *Cohen v. Virginia*, 6 Wheat 264, declared a suit to be the prosecution by a party of some claim, demand, or request in a court of justice for the purpose of being put in possession of a *right* claimed by him and of which he is deprived. It is also decided in this case that if, in any controversy depending in a court, the cause should depend on the validity of a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. In the case of *Osborn v. Bank of United States*, 9 Wheat 738, in referring to the judicial power, the court says, "This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws and treaties of the United States."

There are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper. *Murray v. Land Co.*, 18 How. 272; *Smith v. Adams*, 130 U. S. 167.

The finding or conclusion reached by the Court of Claims, in a case presented to it, is not enforceable by any process of execution issuing from the court, nor does the statute establishing this court make it the final and indisputable basis of action for the other departments of government. The functions of this court are more in the nature of advisory. The Supreme Court has always been very reluctant in exercising its judicial power in reviewing decisions of this court, on an appeal, unless it was empowered to render a decision which was to be a final and indisputable basis of action by the parties and not simply ancillary or advisory. *Re Sanborn*, 148 U. S. 222.

In the present case the Supreme Court, after an examination of former adjudications on this subject, and being of the opinion that the proceedings involve a right which in its nature is susceptible of judicial determination, and also that the Act of Congress conferring jurisdiction authorizes the rendition of a final, conclusive determination, hold that the objections urged against its jurisdiction cannot be maintained and that the act in question is constitutional.

A short summary of the opinion may be stated as follows: That the tribunal awarding the damages dealt only with the two governments as such, having no relations whatsoever with the claimants; that no claims could be presented except through the intervention of the respective governments; that each government, when it entered into the compact under which the awards were made, relied on the honor and good faith of the other for protection so far as possible against frauds and impositions by the individual claimants; that the awards, when paid over, were in strict law the property of the United States, and that no claimant could assert or enforce any interest in it as long as the government withheld it from distribution; that when the La Abra Company asked the intervention of the United States it did so on the implied condition that it would act in entire good faith, and that if it should fail in this respect, it was incumbent upon the government to withhold any sum awarded; that as between the United States and the company, this fact was open to inquiry; that an investigation as to fraud is peculiarly judicial in its nature, and that in ascertaining the facts mate-

rial in such inquiry, no means are so effectual as those employed by or in a court of justice; that the act in question is to be taken as a recognition, so far as the United States is concerned, of the legal right of the company to receive the moneys in question, unless it appeared upon judicial investigation that fraud existed, thereby entitling the United States to withhold the same, and that the same presented a subject for judicial investigation in respect of which the parties assert *rights*—the United States insisting upon its rights, under the principles of international comity, to withhold moneys received by it under a treaty, on account of a certain claim presented through it before the commission organized under that treaty in the belief, superinduced by the claimant, that it was an honest demand; the claimant insisting upon its absolute legal right under the treaty and the award of the commission, independently of any question of fraud, to receive the money, and disputing the right of the United States upon any grounds to withhold the sum awarded.

SCHOOLS—DISCRIMINATION AGAINST COLORED CHILDREN—RIGHTS  
UNDER THE FOURTEENTH AMENDMENT.

In the case of *J. N. Cummings et al. v. County Board of Education, of Richmond County, State of Georgia*, reported in 20 Sup. Ct. Rep. 197, the United States Supreme Court sustains the decision of the Supreme Court of the State of Georgia in refusing to grant an injunction restraining the Board of Education from maintaining a high school for white children only and thereby discriminating against colored children. The facts were as follows: The School Board, for economic reasons, as alleged, temporarily suspended the Colored High School in Augusta, attended by about sixty pupils, in order, they claimed, that the funds thus saved might be diverted towards the education in the primary schools of about three hundred children of the same race. The parents of some of the negro children thus deprived of school privileges, brought suit to restrain the collecting of so much of the tax as related to the colored high schools, and to restrain the Board of Education from using any of said funds for the maintenance of the white high schools. In the decision by the Supreme Court, written by Justice Harlan, he says:

"We are not permitted by the evidence in the record to regard that decision as having been made with any desire or purpose on the part of the board to discriminate against any of the colored children of the county on account of their race. The State court did not deem the action of the Board of Education in suspending

temporarily and for economic reasons the high school for colored children a sufficient reason why the defendant should be restrained by injunction from maintaining an existing high school for white children. It rejected the suggestion that the board proceeded in bad faith or had abused the discretion with which it was invested by the statute under which it proceeded, or had acted in hostility to the colored race. Under the circumstances disclosed, we cannot say that this action of the State court was, within the meaning of the Fourteenth Amendment, a denial by the State to the plaintiffs and to those associated with them of the equal protection of the laws or of any privileges belonging to them as citizens of the United States. We may add that while all admit that the benefits and burdens of public taxation must be shared by citizens without discrimination against any class on account of their race, the education of the people in schools maintained by state taxation is a matter belonging to the respective States, and any interference on the part of federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land."

In this same connection reference may be had to the recent case of *Elizabeth Cisco v. The School Board of the Borough of Queens, New York City*, decided by the New York Court of Appeals on February 6th, last. Mrs. Cisco's children were sent to the common or public schools in that borough, but admittance was refused them on account of their color, and they were ordered to the separate colored school. She refused to send them there—a plan also adopted by her husband before his death. Mr. Cisco was twice tried before a jury and acquitted each time on the charge of violating the Compulsory Education Act, because he refused to send his children to the colored schools when admittance was denied them to the white school. Mrs. Cisco applied for a mandamus to compel the board to receive her children in the common schools. At special term her motion was denied, the court following the decision of *People ex rel. King v. Gallagher*, 93 N. Y. 438. She then appealed to the Court of Appeals. This court, in sustaining the decision of the lower court, says: "In this case there is no claim that the relator's children were excluded from the common schools of the borough, but the claim is that they were excluded from one or more particular schools which they desired to attend, and that they possessed the legal right to attend these schools, although they were given equal accommodations and advantages in another and separate school. We find nothing in the Constitution which deprived the School

Board of the proper management of the schools in its charge or from determining where different classes of patrons should be educated, always providing, however, that the accommodation and facilities were equal to all."

It will be found upon an examination of the authorities that it is almost a universal rule that equality of right does not involve the necessity of educating children of both sexes, or children without regard to their attainments or age in the same school. Any classification which preserves substantially equal school advantages does not impair any rights, and is not prohibited by the Constitution of the United States. Equality of rights is not necessarily identity of rights. *Bertonneau v. Board of Directors*, 3 Woods (U. S.) 177; *State v. McCann*, 21 Ohio St. 211. Where no separate schools are provided it is also generally held that colored pupils cannot be legally excluded from other schools, and that a writ of mandamus will lie to compel the school authorities to receive the pupils thus debarred from educational privileges. *State v. Duffy*, 7 Nev. 342; *Knox v. Board of Education*, 45 Kan. 152. At first sight it may appear that the decision of the United States Supreme Court, above referred to, is in conflict with this last proposition, but upon an examination of the case it will be found that this question is not presented, but the relief asked is an injunction to restrain the use of certain funds for the maintenance of a high school for white pupils.

## RECENT CASES.

**ACCIDENT INSURANCE—ACTION FOR DEATH OF INSURED—CONSTRUCTION OF POLICY—MILLER V. FIDELITY AND CASUALTY CO., 97 Fed. 836.**—A policy insured against "bodily injuries sustained through external, violent and accidental means," but not against "injuries fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled \* \* \* or any disease or bodily infirmity." Insured took some hard pointed and resistant substances of food, and by reason of his weakened condition they killed him. *Held*, that insured died from bodily injuries, and that consequently his representatives could recover.

The present case is one that requires the application of the doctrine of proximate and remote cause. The court has shown very acute reasoning in applying it. The proximate cause of the internal injury is the result of external means. It does not appear so because there is no external violence. This is the feature of the case that makes it peculiar. Whether the violence is external or internal is not the question. It is, rather, where did the means by which the injury resulted originate? Following out this line of reasoning, it is difficult to see any distinction between a case like the present and one where poison has been substituted for the hard substances. But the distinction will be plainer if we give more prominence to the fact that "bodily injury" resulted; actual, physical injury, a rupturing of the bodily tissues.

**ASSIGNMENTS—FUNDS IN HANDS OF ANOTHER—PARTIES—DANVERS V. LUGAR, 61 N. Y. Sup. 778 (App. Term).**—A assigned a certain fund to B. B assigned *part* of this fund to C. *Held*, that C might bring an action at law to recover the amount assigned without joining his assignor, B.

A set up as a defence to C's action the fact that the assignment to C was an assignment of a *part only* of an indivisible claim, and that C could recover only in an action in equity in which the assignor, B, should be joined. This defence was not sustained. The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well settled rule in this State. *Risley v. Phenix Bank*, 83 N. Y. 329, and cases cited. But this is not the universal rule. In *Mandeville v. Welch*, 5 Wheat. 288, a common law action, it was said that a part only of a chose in action could not be assigned for the reason that a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor. This case is discussed, and cases with and against it cited in 5th edition Bispham's Equity 248.

**CHARITABLE TRUST—MASSES FOR SOUL OF TESTATOR—WEBSTER V. SUGROW, 45 Atlan. 139 (N. H.).**—Testator left a bequest in trust for the saying of annual masses for himself, his deceased wife, and her deceased sister. *Held*, that this was a charitable trust in so much as the officiating priest would be performing a religious service, and that it was none the less so because the intercession would be specially invoked in behalf of the testator.

In England, a bequest for such a purpose is void, as being for a superstitious use. In the United States, the doctrine of superstitious uses does not obtain, but the courts differ in their opinions as to whether such a trust will be upheld, there being no beneficiary to enforce it. 5 *Am. & Eng. Encycl. of L.*, 2d Ed., 927, and cases cited.

**CONSTITUTIONAL LAW—EXTENT OF JUDICIAL POWER—INTERFERING WITH EXECUTIVE POWER—LA ABRA SILVER MINING CO. v. UNITED STATES.**—Reported advance sheets decisions United States Supreme Court, February, 1900.—An act of Congress conferring jurisdiction upon the courts of the United States to investigate and render a final decision as to alleged frauds in obtaining an award of damages against the Mexican government, rendered by a commission appointed in accordance with the terms of a conference, is not encroaching upon the provinces of the Executive, and therefore not in conflict with the Constitution of the United States. See Comment.

**CRIMINAL LAW—TRIAL BY JURY—DIRECTING VERDICT—PEOPLE v. WARREN, 81 N. W. 360 (Mich.).**—In a trial by jury for embezzlement, the judge directed a verdict of guilty. The jury at first disagreed, but being severely reprimanded by the court, at once returned a verdict according to the direction. They were then polled, and eleven jurors stated that they would have voted "Not guilty" had they not believed that in so doing they would have been guilty of contempt of court. *Held*, that the judge could direct a verdict of guilty in a criminal case, but could not compel the jury to find accordingly.

In *People v. Neumann*, 85 Mich. 98, the court declares this to be the rule in Michigan, but says that it differs from that in most of the States, which is, that in a criminal case the court may not direct a verdict of guilty. The reason for the general rule, given in *U. S. v. Taylor*, 11 Fed. Rep. 470, is as follows: "A verdict of acquittal can not be set aside, and therefore if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly." With the exception of *U. S. v. Anthony*, 11 Blatchford (U. S.) 201, we find no case outside of Michigan in conflict with this general rule. The court says in this case that whenever the facts constituting the guilt are undisputed, it is the duty of the court to direct a verdict of guilty.

**COMMON CARRIERS—RAILROAD COMPANY—EXCLUSIVE PRIVILEGES TO EXPRESSMEN—HEDDING v. GALLAGHER, 45 Atlan. 96 (N. H.).**—A railroad company entered into a contract with the plaintiff whereby the latter was to have the exclusive privilege of soliciting the carriage of baggage from the former's station. This was a prayer for an injunction restraining the defendant, another expressman, from soliciting patronage on the railroad's premises. *Held*, that a common carrier owes the duty to furnish to passengers reasonable and equal facilities at its station and is bound to accord equal facilities to all who come to that station for the purpose of carrying passengers or baggage beyond its line of road.

*Markham v. Brown*, 8 N. H. 523, declares that the same duty exists in the case of inn-keepers. The general rule seems to be in accordance with these cases, but the Massachusetts court, in the case of *Old Colony R. Co. v. Tripp*, 147 Mass. 35, distinguished between inn-keepers and common carriers, and decided that a contract like the one under consideration was a reasonable regulation. The N. H. court says in answer to this that "regulation is not discrimination."

**CORPORATIONS—FILING ANNUAL REPORT—UPTEGROVE v. SCHWARZWÆLDER, 61 N. Y. Sup. 623.**—*Held*, that § 30, Chap. 688 *N. Y. Laws*, 1892, requiring each corporation of a given class to file an annual report in the county where its principal business office is located, was complied with,



where the report was filed in the county to which the principal business office had, in fact, been legally removed, though the certificate of incorporation still stated it to be in the county where it had originally been located.

In a dissenting opinion, *People v. Barker*, 87 Hun. 342; *Transportation Co. v. Schen*, 19 N. Y. 410, and *Factory v. Dolloway*, 21 N. Y. 449, are cited as being directly opposed to this decision. These cases, and many others in New York, assert emphatically that the statement in the certificate of incorporation is conclusive as to the location of the principal business office. The majority of the court, however, holds that what was said in those cases related to the domicile of the corporation for the purpose of taxation only, and says that, since the present action is brought under a penal statute, a rule more favorable to the defendant applies, the change of location being perfectly legal, and no fraud appearing.

**DAMAGES—MENTAL ANGUISH—WESTERN UNION TEL. CO. v. HINES**, 54 S. W. (Ky.) 627.—A telegram given to defendant for transmission, reading: "Mother started at nine to-night," was delivered to plaintiff in a changed form, so that it read: "Mother died at nine to-night," *Held*, that damages for \$780 for mental anguish was not excessive.

The weight of authority does not recognize mental anguish unaccompanied by physical injury, as a ground of recovery, but in many of the Southern States the courts hold that damages for mental suffering should be allowed in just cases, though unaccompanied by physical suffering. This rule is now firmly established in Texas, Alabama, Iowa, Indiana, North Carolina and Tennessee.

Kentucky limits the application of the rule to the "nearest degree of blood relationship."

**DEEDS—PRESUMPTION AS TO ACCEPTANCE—PORT JERVIS NATIONAL BANK v. BONNELL**, 61 N. Y. Sup. 521.—Where a mother, in consideration of a debt due to her daughter, executes and records a deed to the daughter without her knowledge, and delivers it to a third party, reserving no further control over it, the estate passes, as the daughter's acceptance of the deed is presumed from the fact that the conveyance is to her benefit.

The general rule is that the law presumes that a deed clearly beneficial to the grantee is accepted by him when it is placed in the hands of some third party for his use and benefit. *Moore v. Giles*, 49 Conn. 570; *Cram v. Wright*, 114 N. Y. 307; *Hedge v. Drew*, 12 Pick. (Mass.) 141.

Some authorities dissent from this view, holding that evidence of acceptance or some other act equivalent to acceptance is necessary. *Building Association v. Heil*, 81 Ky. 513; *Maynard v. Maynard*, 10 Mass. 456; Cf. 3, Washburn on Real Property, bk. 111 c. 4. § 2 (Fifth Edition). Hopkins on Real Property says, at p. 435, "There may be a presumption of acceptance from the beneficial character of the instrument, but this presumption does not obtain unless the grantee had knowledge of the existence of the deed." *Jackson v. Phipps*, 12 Johns. (N. Y.) 418; *Younge v. Guilbeaux*, 3 Wall. 636; *Fisher v. Hall*, 41 N. Y. 416.

**FACTORS—UNAUTHORIZED SALE OF GOODS—BONA FIDE PURCHASER—ROMEO v. MARTUCCI**, 45 Atlan. 1 (Conn.).—The plaintiff, a wholesale grocer, shipped goods to Ricciardelli & Bro., to be sold by them in their business as retail grocers, an accounting to be made by them for the proceeds of such sales; the title to said goods to remain in the plaintiff until the same were sold. The defendant bought out the business and stock of R. & Bro. in good faith. *Held*, in an action of replevin to recover possession of plaintiff's goods, that the relation between the plaintiff and R. & Bro. is that of principal and factor; that the consignee having transferred the

property out of his usual course of business, the consignor is entitled to retake the property even from a bona fide purchaser for value; that the consignor is not estopped from setting up his title inasmuch as he has done nothing inconsistent with the real transaction between himself and his factor. *Andrews, C. J., and Hall, J., dissented.*

The general rule is that where the goods are to be sold by the party receiving them on his own account, the owner merely reserving title until the purchase money is paid, the transaction is a conditional sale and not a consignment, and hence under statute in most States is an absolute sale as to third parties unless recorded. But it has also been held that a purchaser of the entire stock will not be so protected, nor will a purchaser not in the regular course of trade. *Burbank v. Crooker*, 7 Gray 158; *Pratt v. Burhans*, 84 Mich. 489.

**INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENTS—ADRIANCE, PLATT & CO. V. NATIONAL HARROW CO.**, 98 Fed. 118. —An owner of a patent published letters and circulars asserting the validity of his patent, that another manufacturer infringed it, and that any one who purchased the infringing article would be sued by the owner of the patent. *Held*, that a bill asking for an injunction against such circulars cannot be dismissed on demurrer.

This decision recognizes that equity may have jurisdiction to enjoin a party from advertising his goods. It all depends upon whether the advertisement uses false, malicious, offensive or opprobrious language, with the purpose of injuring the party claimed to be infringing. *Kelly v. Ypsilanti Dress-Stay Manuf. Co.*, 44 Fed. 19. In view of the undoubted right every one has to advertise his goods so long as he does it in good faith, and of the adequate remedy at law which the plaintiff may claim, if in such advertisement anything libelous has been published, courts are bound to consider such questions as this with great care. There is little law as yet on this subject, but since the case of *Kidd v. Horry*, 28 Fed. 773, courts seem inclined to recognize the jurisdiction of equity in cases where a malicious motive and bad faith are clear.

**INN-KEEPERS—LIABILITY FOR GOODS OF GUEST—MISCONDUCT OF GUEST—LUCIA V. ORNEL**, 61 N. Y. Sup. (App. Div.) 659.—The plaintiff, a guest in a hotel, took a woman of ill-fame to his room with him for consort, who absconded with a sum of his money. Plaintiff then requested the hotel clerk to keep the remainder of his money for him, but the clerk refused to do so, and after plaintiff went back to his room, the balance of his money was stolen from him. *Held*, that plaintiff's misconduct and immorality did not bar him from recovering the balance, subsequently stolen.

*Curtis v. Murphy*, 63 Wis. 4, holds that if a man takes a woman to a hotel for the purpose of prostitution, he does not thereby acquire the rights of a guest. But this does not apply in the present case, as the man was not robbed while occupying the room with the strumpet, but afterwards.

**PARTIES—ACTION BY MARRIED WOMAN—LOSS OF EARNING CAPACITY—TEXAS R. R. CO. V. HUMBLE**, 97 Fed. 837.—A married woman sued for personal injury independently of her husband. *Held*, that she could recover damages for the impairment of her earning capacity, and that this recovery was one in which the husband had no interest.

The present case brings out a distinction that is a source of some confusion, the difference between an impairment of a married woman's earning capacity and her capacity to render services to her husband and family. In the latter case the husband has the right to sue for the injury, not the woman. *R. R. Co. v. Hensen*, 58 Fed. 531. But her capacity to earn money may

be entirely independent of the service she renders to her family. She may be engaged in a separate and independent business at the same time that she is performing her family duties. In such cases it seems that the damages she may recover for an injury that impairs her ability to engage in such business are personal, and that the husband has no interest in them. *Tuttle v. R. R.*, 42 Iowa 518; *Filer v. N. Y. C. R. R.*, 49 N. Y. 47. The fact that in most cases a woman's services to her family are measured by her capacity to do labor, and the resulting difficulty experienced in separating one from the other prevents the distinction from always being clear.

**PERCOLATING WATERS—RIGHT OF CITY TO DIVERT—DAMAGES TO OWNER OF ADJACENT LANDS—FORBELL v. CITY OF NEW YORK**, 61 N. Y. Sup. 1005.—The city, by means of an extensive system of porous underground conduits connected with a powerful pumping station collected the percolating waters of an area of several square miles. This land was bought by the city and used for this purpose only, and no improvement was made upon it, nor was any intended. The direct result was to lower the water level of the plaintiff's and other lands, and destroy the crops growing, or which might have been grown upon them. *Held*, the city was liable for the damages thus sustained.

The case is an extension of the doctrine laid down in *Smith v. The City of Brooklyn*, 54 N. E. 787; 9 *Yale Law Journal* 94. The facts are the same, but here the plaintiff is allowed to recover, not for the loss of the enjoyment of a running stream fed by these percolations, but directly for the loss of the percolating waters resulting in the failure of his crops. There his rights as riparian owner were involved, here only his rights as proprietor of the land. On principle the case is directly contrary to *Chaseman v. Richards*, 7 H. L. 349, and *Bradford v. Pickles*, 1895 App. Cases 587, though the facts were not so strong in the English cases.

**RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE—GILBERT v. ERIE R. CO.**, 97 Fed. 747.—Plaintiff's deceased drove upon a railroad crossing in a covered buggy. At 135 feet from said crossing he saw the approaching train, but drove upon the crossing and was killed. *Held*, the rule that plaintiff's contributory negligence is counteracted by defendant's knowledge of plaintiff's danger and neglect to take reasonable care to avoid injury to plaintiff does not apply where the negligence of plaintiff and defendant is concurrent.

As soon as contributory negligence became a common defence, limitations upon the doctrine began to be developed. One of these limitations is that which is recognized by the Supreme Court in *Railway Co. v. Ives*, 144 U. S. 408, and enunciated in *Davies v. Mann*, 10 Mees. & W. 546, "that contributory negligence of the party injured will not defeat the action if it be shown that the defendant might by the exercise of reasonable care have avoided the consequences of injured parties' negligence." This supposes an unequal amount of negligence on one side or the other. Where the negligence of both parties is equal, the rule does not apply, and the case becomes one governed by the usual rules in regard to contributory negligence. The present case places a natural and necessary limitation upon *Railway Co. v. Ives*.

**RAILROADS—INJURY TO EMPLOYEE—POTTER v. DETROIT, G. H., & M. RY. CO.**, 81 N. W. 80 (Mich.).—A brakeman climbing upon the ladder on the side of a moving freight car, was struck and injured by a telegraph pole located near the track. *Held*, in an action to recover damages for the injury, that, though the plaintiff had many times before passed by this pole, it was a question for the jury as to whether he was chargeable with knowledge of the danger.

This decision rests upon the ground that the plaintiff, having previously passed the pole, either on foot or on the top of a freight car, the danger of being struck might not have been so obvious to him from such point of view as to charge him with knowledge of it. One justice dissents, and says: "This, and like cases that may be found in the reports, we think cannot be sustained upon principle and leave anything of the rule of assumed risks." Cf. *Bailey, Mast. Liab.*, p. 80. "When the location is ascertained the danger is manifest; it being the law and the contract that the servant ought to know that which was plain to be seen, and which it was a part of his duty to learn and know."

**SCHOOLS—DISCRIMINATION BETWEEN COLORED CHILDREN—RIGHTS UNDER THE CONSTITUTION—***ELIZABETH CISCO V. SCHOOL BOARD OF THE BOROUGH OF QUEENS, NEW YORK CITY*—Decided New York Court of Appeals, February 6, 1900.—Where separate schools of equal accommodations are provided for white and colored children, a refusal to grant admission to colored children to the schools maintained for white pupils does not violate any of the rights guaranteed by the Constitution. See Comment.

**SCHOOLS—DISCRIMINATION AGAINST COLORED CHILDREN—RIGHTS UNDER THE FOURTEENTH AMENDMENT—***J. W. CUMMINGS ET AL. V. COUNTY BOARD OF EDUCATION OF RICHMOND COUNTY, STATE OF GEORGIA*.—A temporary suspension of a high school for colored children, in order that the funds used in its support might be diverted towards the education of children of the same race in the primary schools, is no ground for the granting of an injunction restraining the Board of Education from using certain funds for the maintenance of a high school for white children. See Comment.

**STREET RAILWAYS—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE—***WISE V. BROOKLYN HEIGHTS R. CO.*, 61 N. Y. Sup. 530.—Plaintiff alighted at night from a street car at a station in the suburbs of a city, and on starting to cross a parallel track was struck and injured by a car running at high speed, on a down grade, in the opposite direction. The car from which plaintiff alighted obstructed the view of the approaching car, which at the time was from 800 to 1200 feet distant. *Held*, that the question of his negligence should have been allowed to go to the jury, and not decided to be contributory negligence per se by the court; first, because by reason of the darkness and existing obscurities, plaintiff might not, in the exercise of prudence, have determined that the car was too close to render it dangerous to attempt to cross the track, and, secondly, because, since a street railway company is not justified in running its cars at high speed past a car standing on a parallel track to allow passengers to alight, who might cross to either side of the street, its act in so doing, rendering the place appointed for passengers to alight dangerous, is an act of negligence tending to excuse plaintiff's failure to observe the approaching car.

To constitute contributory negligence, an act must be the proximate cause of the injury, and also show lack of care on the plaintiff's part. The New York rule in *Landrigan v. R. R.*, 23 App. Div. 43, holds failure to observe the approach of a car on a parallel track, under circumstances somewhat similar to the present case, contributory negligence per se, but the present case is distinguished because the darkness might have made the failure to see the car not inconsistent with the exercise of due care, and also because, the accident having happened at a station where passengers were being discharged, the company was guilty of negligence in not slackening the speed of the car that struck plaintiff. This may have been the proxi-

mate cause of the accident, thus bringing it within the rule that plaintiff may recover, although careless himself, if the defendant might, by the exercise of care on his part, have avoided the consequences of plaintiff's carelessness. *Cooley on Torts*, p. 812; *R. R. v. Ives*, 144 U. S. 429.

Where the facts are undisputed, and it appears that failure to "look and listen" proximately contributed to an injury which would otherwise have been avoided, such failure should be held contributory negligence, as a matter of law. *Schofield v. R. R.*, 114 U. S. 615; *Tully v. Fitchburg R. R.*, 134 Mass. 499; *Tolman v. R. R.*, 98 N. Y. 198; otherwise the question of failure to use ordinary care should be left to the jury. *Hanks v. Boston, etc., R. R.*, 147 Mass. 495; *Bloiser v. N. Y., etc., R. R.*, 110 N. Y. 638; *Wilson v. P. R. R.*, 132 Pa. St. 27.

**TAXATION—PERSONALTY—MISSOURI, K. & T. RY. CO. v. BOARD OF COMMISSIONERS OF LABETTE COUNTY ET AL.**, 59 Pac. 383 (Kan.).—*Held*, under paragraph 6873 Gen. St., 1889, that the roadbed, track and right of way of a railway is personal property, and not real property, and as such, the tax thereon is a personal tax.

The correctness of this decision is unquestionable, as it is in accord with the statute. However, it is of interest to note that the statute negatives the common law rule which considers the roadbed, track and right of way as realty, a rule which has been uniformly followed in the decisions of the courts. That the legislature has power to say that such property shall be considered personalty must be recognized, since it has the power to treat the rolling stock of a railroad as realty for the purpose of taxation. *Louisville Ry. Co. v. State*, 25 Ind. 177. Although the better authorities treat it as personalty. *Amer. and Eng. Ency. of Law*, Vol. 19, page 883. The Kansas statute, as far as we are able to learn, is without a parallel.

**TELEGRAPH COMPANIES—STOCK EXCHANGE NEWS—MARKET QUOTATIONS—PUBLIC RIGHTS—IN RE RENVILLE ET AL.**, 61 N. Y. Sup. 549.—A telegraph company contracted with the New York Stock Exchange, a voluntary association, to transmit stock-market reports to such persons as the exchange should designate, and to refuse to transmit such information to persons whom it might designate; the telegraph company paying the exchange for the news, and charging the persons so furnished therefor. Petitioner had been furnished such news by the telegraph company prior to the contract, when the company, under order of the exchange, refused him further service, although it had been paid therefor in advance. *Held*, that the petitioner could not compel the telegraph company to furnish him with such news; that information as to transactions on a stock exchange, which is a voluntary association, whose facilities are limited to its members, is not property clothed with a public interest, so as to entitle persons not members to compel the furnishing of such information against the wishes of the association.

The correctness of this decision is unquestioned. It is based on sound legal principles, and is supported by authority. Cf. *Telegram Co. v. Smith*, 47 Hun. 505; *Wilson v. Telegram Co.*, 3 N. Y. Sup. 633. A different conclusion was reached in the case of *New York & Chicago Grain & Stock Exchange v. Board of Trade of City of Chicago*, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411. The basis of that decision was that as the board had created a standard market in agricultural products, and built up a great system for the communication of market fluctuations, upon which the public relied, it could not be allowed to furnish them to some and refuse them to others. If it gave information to one, said the Illinois court, it had to give the same information to all, and the court could compel it to give such information. It would seem clear that the court has no such power. No franchise has

been conferred upon this voluntary association by the public which justifies an interference by the public with its method of conducting business. The doctrine of *Munn v. Illinois*, 94 U. S. 113, does not apply. That case decided that the legislature could regulate the rate of charge for services rendered in a public employment, or for use of property in which the public had an interest. In the present case no property of the Stock Exchange had been devoted to public use, and the public had no legal interest in that property.

**TOWN OFFICERS—AUTHORITY TO WAIVE STATUTE OF LIMITATIONS—**  
**MCGARY v. CITY OF N. Y.**, 61 N. Y. Sup. 689.—A town board has no authority to revive a claim against the town after it has been barred by the Statute of Limitations. The town board is in a sense a trustee, and as such is bound to protect the inhabitants of the town against outlawed or other uncollectible demands. They are in the same position as executors, who cannot waive the Statute of Limitations after it has once attached. *Butler v. Johnson*, 111 N. Y. 204; *Schults v. Morette*, 146 N. Y. 137.

**WRIT OF RESTITUTION—EXPIRATION OF LEASE—STATE EX REL. v. ORTH & BENSON, JUDGE**, 59 Pac. 501 (Wash.).—At the time of entry of judgment directing issuance of a writ of restitution, defendant's lease had expired. *Held*, that under contract pleaded by defendant that he was no longer entitled to possession is not ground for refusing to fix the supersedeas bond staying issuance of writ, as 2 Ballingers Ann. St., § 5546, authorizes either party aggrieved by such a judgment to appeal, as in other civil actions. Fullerton, J., and Dunbar, J., dissenting.

Substantially the contention made by the respondent is that no real contention arises upon the appeal, that, the lease having expired, the subject-matter of the contest has ceased to exist. This position is held by the dissenting judges, who rely, as the respondent, upon *Hice v. Orr*, 16 Wash. 163. The court, however, held that a mandamus should issue, as it could not inspect the record of the trial to determine the merits of the case, and that as the pleadings disclosed a controversy, the appeal should be allowed as provided by statute.

## BOOK REVIEWS.

**A Treatise on Criminal Pleading and Practice.** By Joseph Henry Beale, Jr.,  
Professor of Law in Harvard University. Cloth, pp. 384. Little,  
Brown & Co. Boston, 1899.

The students' series of text-books, started by Messrs. Little, Brown & Co. a few years ago, is now so well known that it is unnecessary to comment on its excellence. Although designed, as the name implies, primarily for students, and as a basis for the instructors' work in the class-room, yet the books have been written by such excellent authorities and have been so uniformly compact and yet complete, that the lawyer in active practice has found them of the greatest service on many occasions. To this series Professor Beale has contributed the present volume. It embraces the whole subject of Criminal Procedure and Pleading in a small compass; the condensation has been made with great skill and accuracy. The bulk of the book has been reduced by leaving untouched, matters of local procedure and details. The indictments for homicide, perjury, forgery, embezzlement and false pretenses, however, have been treated fully, on account of the frequent difficulties which arise under them.

**Wit and Humor of Bench and Bar.** By Marshall Brown. Cloth, pp. 544.  
T. H. Flood & Co., Chicago. 1899.

Mr Brown has the advantage of his lay readers, a class which he has no doubt hoped his book might entertain. Their iridescent ideas of the incident of bench and bar may perhaps be even more highly colored after reading the facetiae here compiled. But the profession will fail to see the reason for the book. The collection of legal anecdotes and amenities has been so much done, and with such success, that there seems no occasion for another, unless under the possible pretext of making it up-to-date. Some witticisms of late lawyers are indeed served up. A few of them are very good, and more are rather flat. The author, it seems to us, has failed in the greatest essential of such a difficult task, the art of omission. For the author's preface we are grateful, wherein refraining from "humbly dedicating the work to the profession," this art was most effective.

# YALE LAW JOURNAL

---

Vol. IX.

APRIL, 1900.

No. 6

---

## RESULTS OF EXPANSION.

In January, 1896, the territory of the United States lay in one continent, in a compact mass, its longest diameter being about three thousand miles. Its people, though differing in intelligence, were so far homogeneous that they could be safely intrusted with the rights of civil liberty guaranteed by the Constitution. To-day, the territory of the United States stretches over twelve thousand miles of land and sea, its various parts separated by thousands of miles of water from each other. Its inhabitants are some of them at such a low stage of human development as to be beyond the pale of constitutional guarantees. Though belonging in some sense to the United States, they cannot be for a moment considered as citizens of the United States.

In January, 1896, the army of the United States consisted of less than 25,000 men. To-day it numbers 100,000. For the year ending June 30, 1896, the expenditure for the war and navy departments was in round numbers \$78,000,000. For the twelve months ending with December, 1899, the expenditure for the same purpose was \$293,000,000. The change in conditions, when we consider the brief period in which it has occurred, is simply amazing. This change has introduced a new line of cleavage into our politics and given rise to two rival schools of political thought, which may be fairly described as the expansionist and the anti-expansionist or anti-imperialist. The one looks upon these events as but the natural working out of the destinies of the nation. The other views with alarm such a departure from its traditions. The issue between these two parties has not always been fairly stated. The anti-imperialist is not necessarily pledged to any retrograde step as regards the possessions already obtained. He views their acquisition with re-



gret. He believes that they are a disastrous inheritance, and hopes that some honorable method may be found of relieving ourselves of the responsibility. He protests vigorously against making what has already been done a precedent for still further extension. But he does not necessarily believe in the immediate abandonment of such possessions without regard to the interests of the inhabitants, nor to obligations of honor to other nations. On the other hand, the expansionist, believing as he does, that the additions are a benefit to the nation and a part of its destiny, is, by the necessity of his position, committed to a policy of still further expansion. Conversation with intelligent advocates of this policy will call forth an enunciation of principles which involve an enormous development of their plans. Without any hesitation, they announce an intention of competing with the other great nations for a foothold upon every continent and a share in the settling of all the problems which are arising in regard to the division of unsettled territories, or territories inhabited by uncivilized nations.

In the brief space allotted to me I propose to call your attention to some of the considerations which lead me to believe that the acquisition of territory at remote distances from our natural borders, inhabited by barbarous or semi-civilized people, is fraught with disaster to this country.

That the inhabitants of this country have hitherto been the freest in the world, that they have been subject to less interference with their individual liberties than those of other countries, will be, I presume, admitted by all. We do not owe this to any remarkable or unheard of wisdom on the part of our legislators, nor altogether to our written Constitution. Laws on paper are but poor protection to individual rights when popular passions, or great necessities, call for their sacrifice. The solution of the question why we have been so politically blest must be found somehow in our natural situation. Accordingly, we find we have been separated on all sides save one, from the territory of any great power capable of menacing our security. Our isolation is the one natural condition in which we differ from all other nations. The great powers of the continent may be fairly described as always in a condition of war. If not engaged in active hostilities, they are always in a state of armed preparation for instant action, which is equally burdensome and expensive. The inhabitants groan under intolerable financial burdens which confiscate a large portion of the earnings of labor. Their best years are occupied in the fruitless labors of military drill. In such an atmosphere, civil liberty cannot secure a strong or har-

monious growth. Some of the best elements of our population consist of native born citizens of European countries, who have come to this country to escape the conditions which I have described. The expansionist policy necessarily involves the throwing away of all the natural advantage which our isolation has given us. The right of occupation involves the duty of protection. The further the territory possessed is from the base of operations, the greater must be the difficulty and expense of furnishing that protection. In this respect the protection of each one of these remote regions must always demand the maintenance of a very large naval and military force, which must be resident because it cannot be sent to such great distances at short notice.

The United States has been distinguished from all other nations in that it has not been a military power. Its numerically insignificant army and navy have been, the one a mere internal police force, and the other simply enough to make a respectable showing in the ports of other nations. The change in its condition referred to necessarily involves its transition into a military power, with all that that involves. If the expansionist policy is to prevail, we must henceforth, if not actually at war, be at all times prepared for hostilities and for the protection of distant colonies, some of which will be in close proximity to the territory of other nations. We shall be involved in discussions as to the division of lands on other continents, out of which controversies will continually arise. The old Latin phrase, *inter arma silent leges*, involves a great truth. In time of war there are no such things as individual rights, is a free translation, following the spirit if not the letter, of the Latin. Those who recollect the Civil War know what that means. In times when the nation was struggling for its existence, all patriotic citizens were ready to renounce for the time being their individual rights. For five years, full individual liberty scarcely existed. The citizen was not at liberty to criticise beyond a certain extent the operations of the government. The extent of his right of free speech, his right of individual action, was bounded by military necessities. War necessarily involves this to a certain extent. Not only active hostilities but armed preparation for such emergencies of necessity involves a great sacrifice of those rights and liberties which this government was professedly organized to secure. That we have been enabled to maintain these rights to the extent we have is chiefly because of the one hundred and ten years since the adoption of the Constitution, we have had at least one hundred of unbroken peace. That

the European nations have not enjoyed the same freedom is because regard for their own safety has compelled them to be constantly in arms. The professional soldier, whatever his virtues, is not a free citizen. His principle of action is unreasoning obedience to arbitrary authority. He does not generally exercise his political rights. He scorns discussion and is always for prompt action. The obedience of the citizen of a free commonwealth is the result of the conclusion of his reason that the commands are, on the whole, wise and just, or that it is better in the interests of law and order to submit. Discussion is the breath of the life of civil liberty. Where a military spirit prevails among the people, freedom must grow less. The experience of the last few years is sufficient to prove that. Five years ago, the citizen scarcely felt the power of the general government. It imposed no tax that he could perceive and no restraint upon his liberty of action. He paid a tariff tax, perhaps, in case he had occasion to import goods. He paid the United States for carrying his mail. Outside of that, so far as the general government went, he was absolutely free to engage in any occupation he saw fit and to dispose of the fruits of his industry, during his life or after his death by will, without tax, imposition or restriction. How is it now? Does he possess the same freedom that he had five years ago?

There are two systems of taxation; taxation upon property and taxation upon liberty. The United States Supreme Court, in the Income Tax case, has practically decided that the United States can only tax liberty. It cannot tax property. At least, such taxes must be apportioned in accordance with a rule which makes any such imposition practically impossible. All the burdens of war, therefore, must be supported by burdens or impositions upon free action.

We have been engaged for the last year in a war which, except for the deplorable loss of valuable lives, can scarcely be dignified by that name. We have had an army chasing savages around the swamps of the Philippines. And what has been the result? The citizen cannot dispose of his real estate, or any of his personal property, without asking the consent of the United States and paying for that privilege. He cannot pay his debts in the ordinary way in which they are paid among business men without paying the United States for that privilege. He cannot give his property, even in charity, after his death, under the provision of his State law, without having the United States Government stretch out its hands

and confiscate a portion before it reaches the beneficiary. He cannot, as an honest man, give to his creditor a written acknowledgment of the debt he owes him unless he has the wherewithal to pay the United States for that privilege. The storekeeper cannot sell a bottle of medicine to a sick man without also paying to this great and beneficent government of the United States a certain sum of money to enable it to hound Tagals and Negritos through tropical forests. If he wants to deed his real estate, his condition is most parlous. No matter how far he lives from the centres of population, he must travel to the internal revenue office, arriving there during such business hours as it suits the Government to keep the office open, purchase a stamp, the cost of which is fixed by a certain arbitrary rule based upon the supposed value of the thing sold, independent of whether the transaction is beneficial to the parties or not, and affix that stamp. He must then not only erase it, affixing his initials, but under a new regulation, he must cut the stamps in a certain way. If he does not do all these things, he is liable to severe penalty. The amount of friction, embarrassment and general annoyance to business and individual transactions involved in these regulations is enormous. The right to tax is the right to destroy.

Granting once the right to tax, there is no limit to the amount. Nor have the possible methods of taxation been exhausted. The United States may go further and tax every man for the right even to exercise any means of livelihood. How is it with the right of free speech, the right of the mails, free communication? We hear distinguished members of Congress, for exercising the right of free discussion, denounced as traitors. Eminent publicists have been threatened with arrest, their mails broken into, because they chose to send to certain soldiers arguments against the Philippine war. All these things are as yet in the bud. If already a large portion of our freedom of action has been sacrificed what are we to expect when this glorious expansion policy has had its full development? When we are to have our share in the division of China, our colonies and stations in Africa, and in all the uttermost parts of the earth. Where a hundred thousand men is now necessary, five hundred thousand may become necessary, and the burdens and impositions which already so irritate the citizen must be indefinitely increased.

We are incorporating into our politics new principles which must have enormous consequences. The founders of the government put forward this declaration as their principle of action, that

all men were born free and equal. They were not foolish enough not to perceive that in one sense this declaration was absolutely false. Everybody knows that the native of Dahomey is not equal to the native of Massachusetts, that he is not even born free. On the contrary, he is born an abject slave, without any rights whatever. But this declaration, though false in an absolute sense, was true in this sense, that it was the basis upon which this government was organized, and as regards the affairs of the nation was a true working rule. It was one of those fictions, if you please, like the rule of the English Constitution, that the king can do no wrong; false in fact, but true in a sense, because it involves the principle of ministerial responsibility. So it was the true spirit of this government that all men under its control should be free and equal. Its institutions were of such a nature that they were unworkable on any other theory, and that they could not be adapted to any people of which this proposition could not be truthfully affirmed. The fathers of the nation attempted a mental reservation. They tried to incorporate a secret exception and qualification, that all men were free and equal provided their skins were white. But their exception in its results only proved the general truth. After seventy years of trial, that exception nearly broke up the existence of the nation. After many decades of controversy and five years of war, we got rid of it, and then for the first time there was rest and harmony. Disregarding the lessons of this disastrous experiment, we are now seeking to incorporate another exception. We are about to say that all men are born free and equal who live within the limits of the United States of America, as they were prior to the acquisition of new territories, but that the natives of Porto Rico, or the inhabitants of the Philippines, though subjects, are not free and equal, are in no sense endowed with the constitutional rights. This exception is necessary if we are to go on acquiring colonies of that character. To apply the jury system and the ordinary methods of administering law, and popular institutions, to nations like the Tagals and the Negritos is utterly impossible. If we are to own these countries, we must own them as masters and the natives must be subjects simply and not citizens.

It is true in politics that a nation cannot be a master without its citizens becoming, to a certain extent, slaves; without sacrificing a large portion of their liberties. That a change is coming over the spirit of a large body of the people of the United States, is indicated in a variety of ways. We have even invented of late years a new

term for the national flag. The advocates of this vast expansion scheme have come to speak of the flag as Old Glory, a term that might properly be applied to the tricolor of France, but would scarcely have been deemed appropriate in former times to our own national standard. It has never hitherto been an emblem of conquest. It is now sought to make it such. The more it becomes an emblem of conquest the less it will become an emblem of freedom. If the expansion policy is to prevail, it must wave over subject nations without full political rights. It must also float over a people who, for an empty dream of foreign empire, have sacrificed a large portion of their freedom of action.

TALCOTT H. RUSSELL.

## THE FUTURE OF CIVIL SERVICE REFORM.\*

I have been asked to talk to you on some phases of the question of civil service reform, and perhaps a glance at the future of the reform as it appears in the light of the past and of the situation at present will be as interesting as anything I am competent to undertake.

This opportunity is very agreeable. I am deeply interested in the reform, and have been more or less actively connected with the organized effort to promote it for something like a quarter of a century. I may say that I approached it from the side of practical politics. I have belonged in my time to that class which is more numerous and diligent than the professional politicians like to believe, who "go to the primaries" and do what they can to shape the policy of the party they most nearly agree with. I regard such action as a duty, and I tried to carry it out with some persistence as long as I could find a party that would permit me to do so without pledging agreement and support beyond what my conscience would consent to. Much to my regret, that is no longer practicable in the State of New York, and for some time I have been forced to class myself with that fortuitous aggregation of unrelated voters known as the Independents. Now it appears to me that one of the chief causes of the development of party discipline and party allegiance to an unhealthy and extravagant degree is the evil of spoils, and in civil service reform, which seeks the gradual abolition of spoils, one underlying motive is the emancipation of the voter.

Certainly we cannot expect to get rid of parties. It is idle to fancy the management of public interests by the will of the majority if there is to be no organized effort to shape and express that will. Nor can we hope that party action will be free from the influence of ignorance and prejudice and greed. But this seems to me to make it only the more needful that the mechanism of our politics shall be kept as clean as possible, that the organization requisite in any government by parties shall not be more selfish than at best it must be. Co-operation for unselfish ends is difficult, and is more and more so as the community extends and its interests become more complex. It is therefore well that we shall not set up prizes for selfish co-operation at the very threshold of political action. Prac-

---

\*Talk delivered before the Graduates' Club, New Haven, March, 1900.

tically that is what is done when all the minor places in the public service are in the hands of the party leaders for distribution as the rewards of past or for future party work. The tendency of this arrangement to make of politics not merely a business, but a pretty shabby and sordid business, is marked. Those of us who have in larger or less degree undertaken to do anything in politics with no promise or hope of personal gain, but solely for what we imagined, at any rate, was the advantage of the public, have found ourselves handicapped in a contest with a lot of gentlemen whose bread and butter and a good deal of spending money depended on defeating us. So far as our own immediate purposes are involved, this may not be so important as we think it is; but the trouble does not stop with such dreamers and dilettanti as college graduates are reputed to be. It extends to every class in the community and to the whole Nation. It involves the most concrete and practical interests and rights.

Take a single instance. Doubtless every gentleman in this room has suffered, and some of us have suffered sorely, from the disturbance of business by the confusion and uncertainty of currency legislation. All of us will agree, I think, that the law of 1890, commonly known as the "Sherman" law, was about as bad a part of this legislation as the wit of man could devise. Now it is on record in the memoirs of the venerable statesman who gave his name to that amazing measure that it was passed because "the silence of the President on the matter gave rise to an apprehension that if a free coinage bill should pass both Houses he would not feel at liberty to veto it." (Recollections II, 1070.) The statement has been disputed, and I do not know if it be correct or not. But it stands there in the Senator's memoirs without any indication that its author thought the fact reported disgraceful. It shows the accepted standard of independence and civic courage in high places and at critical times. One cause for this low standard, and a powerful one, is the concentration of political desire on the spoils of office. It is a pernicious and insidious force. The movement to resist and abate it is a sound and healthy one. What may we reasonably believe as to the chances of its ultimate substantial success?

I think that we may believe much. The movement has in reality had not a little good fortune. At the very start of its present development the murder of President Garfield by a greed-crazed spoils seeker gave to the reform its baptism of blood. It made possible the passage of the Federal law fixing on the statute book the principle of appointments for tested fitness without regard for party politics.



That law was enacted by a Congress in which there was not even a strong minority of convinced advocates of that principle, but in which the majority bowed to the storm of indignant feeling that swept over them from every quarter of the land. In that Congress the same men were leaders who a few years before had forced the conqueror of the rebellion to abandon his attempt to apply the principle tentatively to a small part of the Federal service. These leaders were in part men who owed their power to the adroit and not too scrupulous use of offices as spoils. In part they were men who had been imbued with party spirit in the tremendous and often doubtful struggle of the civil war, and who believed honestly and profoundly that to give offices to the other side under any circumstances was giving aid and comfort to the enemy—as if they had sent food and ammunition into the lines of Lee. But neither the intense consciousness of their own selfish interests nor the still more intense partisanship of conviction and prejudice could withstand the influence of the popular emotion aroused by the dastardly and logical act of Guiteau. Nor was this the sole benefit that the cause of reform reaped from that act. It brought into the presidency a man skilled in the minutest arts of the spoilsman, the most astute, daring, and experienced manipulator of patronage known to the politics of the State of New York. To him was intrusted the organization of the reform, and when he undertook it the politician in him ceased from work and the conscientious gentleman took charge. To a smaller man it would have been a sore trial, if not impossible. He had to incur the hatred of his former allies, and he had to win the confidence of those who had good reason for deep distrust. His task was done with singular impartiality, with firmness, and with sagacity. In the lovely burial ground overlooking the Hudson at Albany is his monument; a figure of great dignity and sweetness lays on his grave a single palm. If in his brief National career I should name the thing for which President Arthur merited the palm of well-won victory it would be the wise and faithful way in which he set the foundations of Executive action under the civil service law.

There is another element of good fortune to which the cause of reform owes something. It has so happened that from the passage of the Federal law to the present time each Administration has been succeeded by one of the opposite party. Mr. Cleveland followed Mr. Arthur; Mr. Harrison Mr. Cleveland, who came in again when Mr. Harrison went out, and was followed by Mr. McKinley. I do not wish in the least to detract from the credit due each of these

successive Presidents for their advance of the reform, or for their resistance of pressure to restrict the reform, but it will not be denied that what they did was rendered less odious to the politicians by the prospect that its effect would fall on the politicians of the rival party. It is to be noted also that some of the most radical changes in the rules have taken place at the close of a Presidential term. I do not at all believe that there was an intention to embarrass the rival party about to come in, but the changes clearly met with less resistance from the politicians than they would have met at an earlier stage. And I am persuaded that if either party had been in power securely for two, not to say three, terms, either the Federal law would have been repealed or the merit system in the Federal service would have been greatly impaired. I am confirmed in this opinion by the harm that has come to the merit system under a President who has reason to feel very confident of a re-election. I am not conscious of any prejudice against Mr. McKinley, for whom I voted, whom I have supported on some hotly contested questions, and who seems to me, at this time, on the eve of another election, distinctly a safer candidate than any other likely to be presented. But I am forced to acknowledge, with great regret and no little chagrin, that in the fourth year of his term the merit system does not stand on so firm a footing as it had when he became responsible for it.

I have mentioned some of the things that seem to me to have been fortunate for the reform in the Federal service. I do not think that without these aids—which were in some degree accidental—the cause would have made so much progress. In looking toward the future I think we must keep these things in mind or we may expect too much. Especially we must not be blind to the great strength the professional politicians may have if the party in power shall win in the next election with very little open opposition from the class with whom the support of the reform is a matter of intelligent conviction and civic conscience. The spoils system has back of it the substantial force of organized greed and the less defined but very strong force of partisan feeling. Against these there has been a barrier of some resisting power in the fear that the opposing party might come in. If this barrier is removed, and the President exerts no greater restraint than he has felt called on to exert so far, the recovery of the lost ground will be arduous.

Here then we see one element in the calculation of the immediate future. It is the danger from the lack in American politics of a strong, united, and earnest party to do the work assigned in Eng-

land to "her Majesty's opposition." That is a danger not easy to calculate. The reform of the civil service is not likely ever to become what we call an "issue" in National politics. It is not definite enough. Parties cannot very well be persuaded to divide on it. Neither one is willing to take openly the opposing side. You might as well expect to get up a National controversy on the commandments. Undoubtedly the law of Sinai against stealing is involved in the practice of the spoilsman, but you are not to expect that he will frankly organize a pro-stealing party. Then the reform does not touch the people very closely or directly. The evil to which it is addressed is not strongly felt. Especially the supreme evil of the debasement of the suffrage and the subjection of the voter to a sort of partisan slavery is not felt because that kind of slavery is too often quite voluntary. You cannot make a man fight to rid himself of chains that he either is not conscious of or regards as fashionable and ornamental, so that he inclines to look down on those of us who are not provided with them. For that matter, I take it that there are not many among us whose political action has been decided in any recent National election solely or chiefly by our views as to the reform. These have had an influence, but it has not been controlling. We must, I think, accept the fact that the reform will not for a long time to come be promoted by the hopes of victory for either party or the fear of defeat for the other by the votes of reformers. It must depend on the influence in support of the reform that can be brought to bear on the persons in actual possession of power, and that influence will necessarily be indirect. Let me now glance a little more closely at the actual situation.

The condition of the Federal service at this time is by no means wholly satisfactory. The reform has had some serious setbacks in the past two years. Following the change of Administration there was much disregard of the rules, especially in the branches most recently classified and brought under the rules. In many cases this was practically condoned by the Executive order of last May, and probably the underlying motive for that extraordinary order was the preference for peace over strife which is a marked characteristic of our amiable President in domestic matters. It would have been a tough task to bring all the officials to account who had evaded or defied the rules, and in Congress or in the party councils there would have been little support for such a policy. Unquestionably it would have made great friction in Congress, and have retarded, if it did not block, the important measures the President had at heart. It was much easier to change the rules to meet the situation than it

would have been to compel the great body of officials, mostly appointed for political reasons, to conform to the rules. The course pursued was not heroic, but our political system does not tend to the production of heroes at the top, and we must not forget that it is on the whole a representative system, and that moral heroism is not the ruling passion of American voters. Nor, looking back on the history of recent years, and tracing the use of political influence in important legislation—in the repeal of the famous Sherman currency law, for instance—can we say that the course of the President is unprecedented.

It was, nevertheless, unfortunate in its effect on the service. The injection into the service of a large number of appointees chosen by Congressmen on the old and bad plan, under the stress of alleged necessity arising from the war with Spain, worked ill both ways. It let down the bars of competitive examination and lowered the standard of fitness on the one hand; on the other, it stimulated the appetite for spoils the increase of which doth grow with that it feeds upon in the most extraordinary manner. Congress took the cue from the President and deliberately refused to put the vast census work under the merit system, though the experience of the least scrupulous politician ever responsible for that work compelled him to protest against the extravagance and stupidity of turning it over again to the spoilsmen. Besides these actual ills which Congress has brought about, it has attempted many others, such as the enactment of many exceptions to the rules, the extension of exemptions for veterans of the civil war and of the Spanish war, and the refusal of the appropriation for the commission. The refusal failed, as it usually fails, in the fierce light that beats upon a vote by aye and no. Some of the other attacks will probably succeed. In any case Congress has sadly disappointed the confiding expectation of the President that the concessions he made to the spoilsmen would prevent them from grabbing more.

There are entries on the credit side during this Administration. The order regulating removals, first applied by Mr. Bissell in the Post Office Department, has been extended to the entire classified service by the President, and has distinctly reduced the proportion of removals. It is true that it has been evaded and the evasions have not been dealt with severely, but its great use has been in affording a defense for the honest officers who really wish to resist the pressure of politicians. There are many of these even among the political appointees, and especially in the large offices of the Postal and Treasury Departments, where business is exacting and re-

sponsibility great, the barrier of the merit system is pretty firmly maintained.

The outlook apart from the Federal service is bright in many directions. It is especially so in the State of New York. With the election of Mr. Roosevelt the State secured a Governor more intimately informed as to the principles and methods of the merit system than it had ever before had. His work at the head of the Federal Commission had been most intelligent, energetic, and effective. No one had done as much as he to bring the true nature and working of the reform to the clear understanding of so large a class. He had, for example, for the first time in the history of the Government demonstrated to the representatives of the then minority party, particularly those from the South, that the Federal service was open to their people as freely as to others, on the sole condition of proved fitness. The commission organized examinations in all the Southern States, and Congressmen from that section were surprised and delighted to find at the close of President Harrison's term hundreds of capable young men and women from among their constituents earning their living in the departments at Washington under a "hostile" Administration. It is Mr. Roosevelt's conviction that the merit system will be strong with the people everywhere in proportion as it is honestly applied and thoroughly made known. At the first session of the Legislature after his term began the civil service law now in force was passed to take the place of a confused and sophisticated mass of statutes intended to "take the starch out of the reform" and which had in fact left the service in a most limp condition. The existing law is well adapted to carry out in its integrity and practically the principle of appointment for proved merit and fitness imbedded in the Constitution of the State. The service not only of the State and of cities, but of the counties also, is brought under the effective supervision of the State commission. While ample power is given to each community to regulate its service under the conditions fixed by the law, failure or refusal to do so is followed by the action of the State commission, whose approval is necessary to all rules adopted by the several communities. The Tammany Mayor of the City of New York was happily inspired to decline to accept the rules which his own commission had agreed on with the State commission, and gave the State commission the chance to frame other rules, omitting the concessions made to the City commission for the sake of harmony. The result is that the city now enjoys a very complete, logical and fair set of rules, which, I am happy to say, are very satisfactorily

applied. The system for securing the equal rights of laborers to employment, as well as the right of the city to the most efficient labor it can get, is particularly successful. It was found that the rule of first come first employed, which is the essential feature of the registry plan, had been evaded by the simple process of dismissing employes until the man with a pull had been reached, when the employment became steady. This abuse was met by a rule giving employes dismissed for lack of work preference for re-employment, and their names are kept on a special list for that purpose. One most interesting result of the firmer establishment of the merit system in this direction is that there is growing up among the laboring classes, and especially among the trades unions, a substantial sentiment in support of the principle of that system, and the pitiful sophism of the spoilsmen that that principle wrongs the common people is losing its hold.

In San Francisco the system has recently been established under circumstances that are particularly heartening. The Merchants' Association of San Francisco is a body composed of citizens engaged for the most part in the promotion of local industries, and has for some time held a peculiar relation to the City Government, taking an active part in the discussion of all municipal matters and making its influence felt on many occasions. Two or three years ago, for instance, the association bid publicly for the contract for cleaning the streets, setting a figure practically at cost and winning the award. It then proceeded to clean the streets in a manner that provoked the admiration of the town, closely following the plan at that time in successful operation under Col. Waring in New York. Finally, at the instance of the association, a new charter was submitted for adoption, at a popular election, the principal feature of which was a requirement for a strict merit system in all departments of the City Government. The campaign in which this charter was debated turned very largely upon this single issue. A favorable majority of 4,000 was given. Ratification by the Legislature followed, and on January 1 last the charter went into operation. Mayor Phelan has appointed prominent members of the Merchants' Association to the civil service commission, choosing its secretary and counsel as President of the new body. Taking the experience of other cities throughout the country as a basis, and using their reports and forms, the new commission is preparing a code of rules and classifications that will probably prove superior to any in the country, and that will include within their scope almost the entire subordinate city service of San Francisco, excepting only the heads

of departments, deputies and a few confidential officers. It is not unlikely, in short, that San Francisco will shortly present one of the best object lessons of the results of civil service reform in practice, and it is interesting to note that the demand for the reform is spreading to other cities along the Pacific Coast.

Another encouraging feature in the situation is that the merit system itself has been undergoing a healthful evolution. It is becoming more adapted to its uses. You all know that the chief objection to it at first was that it was not practical, that it made education the chief qualification for appointment, and that the questions asked in the examinations were ludicrously unrelated to the duties of the place to be filled. Of course there was a good deal of exaggeration in these charges, and there was no little plain lying. But also there was some truth. The examiners were new to their task, and entirely untrained in any like work. In the Federal service they were taken usually by detail from the departments, and served without extra pay, and to the injury of their chances for promotion in their own offices. In the State and municipal service they were often men not in public office at all and without direct experience in the duties of the places applied for. Mistakes were made, and they were sometimes pretty absurd. There was a very natural notion that the examinations should test general intelligence with questions relating to the things taught in the schools, but not always involved in the work sought by the applicants. That notion, I think, is gradually being abandoned, and it is well that it should be. The essential purpose of examinations is to test the knowledge that will be needed in work. That can best be done by questions about the work. If the work is complex or technical or difficult, adequate knowledge regarding it will be evidence of sufficient general intelligence. Moreover, applicants are on a more nearly equal footing in the ratio of their knowledge if the questions relate to the work. Outside of that they may be most unequally matched. Most of you know that success in an examination among students is by no means in strict proportion to actual knowledge, much less to mental power or equipment. There is a good deal of chance about it, and temperament has much to do with it. In the civil service the tendency has been to reduce the chance as much as possible. The examinations at best are but a partial test, and those that pass them secure only appointments on probation. It is certainly best that the examinations should be made to bear directly and as completely as may be on the real qualifications needed in the employment sought. The change is in the direction of better adaptation and is, as I have said, a healthy evolution.

We need not, then, accept the outlook as gloomy, or be discouraged in efforts to improve it. That certainly is not my own feeling. Perhaps I, in common with others of the older men who have given a good deal of time and labor to this particular end, have acquired the habit of persistent confidence. We have seen darker days. It was a good deal darker before the first dawning rays broke through the dense partisanship of the reconstruction period. And those of us who have paid any attention to the political history of the country know well enough that the present condition of things is very bright indeed compared with that existing in the first third of the century, and that men of that time bearing names now honored could have given points to the most skilled and least scrupulous office broker now in the Senate of the United States. In a general way I am persuaded that in the long run and in large currents of affairs honesty really is the best policy, and that the discovery and application of that truth is more a matter of intelligence, of shrewdness, of what we call, oddly enough, common sense, than we are apt to think. We, all of us, have some pride I fancy in the way in which the English have on the whole managed the enterprises they have undertaken in the less civilized parts of the earth, in India especially, and of late years in Egypt. We look with a good deal of satisfaction on the replacement of war and poverty and a'most chronic famine by a marked degree of peace, order, fair dealing, and average well-being. They have not attained perfection, they have made some bad blunders, and are struggling with one of the worst of them at the present time. But they have made great advances, and have changed the face of the regions they have dominated for the better. Now they are not in profession or in feeling a missionary people. They are not tempted by the glory or aroused by the duty of spreading either civilization or Christianity in the lands where these do not exist. They are, on the contrary, an essentially selfish and even greedy people, very much as the Americans are. They went to India to trade, and they went to Egypt largely to prevent others from interfering with their trade with India. Wherever they go the flag follows trade until the voices of their drummers like their morning drum beat encircle the globe. But they have the sound business sense to see that trade grows fastest and is most profitable where order, justice, and freedom are most general and secure. They see that a man can produce more that is fit to buy, and can buy more than is profitable to sell if he lives under equal laws, in decent conditions and with all the advantages of civilization that he is capable of using. I do not say that the average English trader formulates this theory, but he and the government at home and



abroad do better than formulate the theory ; they act on it. And so, in a rude way, with many exceptions, and through much groping, the English flag steadily pushing in the wake of English trade, has come, more than any other, to stand in the world for order, justice and freedom.

This seems to me an illustration of one of the general grounds that we have for confidence in the future of the merit system in the United States. Let me call attention to a very striking recent instance of the relation of the system to practical affairs. The State of New York is carefully studying the question of the enlargement of its waterway from the lakes to the seaboard. It is a big question, far bigger in its ultimate bearing now than it was when De Witt Clinton first undertook its solution. Then it involved the cheap transport of grain and lumber from the shores of Lake Erie along the line of the Mohawk Valley to the City of New York, which was then no larger than Boston and not so large as Philadelphia. To-day it involves the share of New York in the trade that originates on the one hand in the whole vast region of the upper basin of the Missouri, on the frontier of Manitoba, and on the other extends to the remotest marts of Europe. A commission was appointed by the Governor of New York to report on the general policy of the State. At its head was Gen. Francis V. Greene, one of the most broad-minded, astute, and practical men of affairs in the Union. It is worthy of note that for nearly a year he and his associates gave to this work as much time as to their private affairs, without any compensation beyond the satisfaction of serving well the public. That is already an augury of good. They finally reported a plan requiring the expenditure of some \$60,000,000, by which they believe it will be possible to secure benefits with which this expenditure will be a mere trifle. But they reported that they could not recommend the first step in the plan unless it were accompanied by legislation putting the entire construction and administration of the great work strictly within the merit system and absolutely freed from the influence of partisan politics. Here is the deliberate judgment of very able and widely experienced men that the price the State must pay for success in its most important enterprise is the honesty of the merit system.

Now there are two classes or groups of enterprise that closely engage the minds of Americans in these days. To the success of either, to any dimmest hope of success in either, the adoption of the principle of the merit system and its firm and exacting application are plainly necessary. One is illustrated by the example of the New York State canals which I have just cited. This rests on the

idea of public ownership and operation of great public works for the benefit of the community at large, either directly by affording service cheaper or better than can be had from the like works in private ownership, or by reducing the cost to the public of private service through the competition of public service. A considerable sentiment has grown up throughout the country in support of at least an experiment in this idea. Municipal trading, as our British brothers term it, seems to a large and probably increasing number of our people a good thing to try. It is not so novel a thing as some of the more conservative of our economists appear to think it. We have it on a large scale in our postal service. We have it in nearly every city and town in the supply of water. We have something very like it in every hamlet of the land in the public school. To many men it is not easy to see why logically the public may not take up the supply of light and of some form of transmissible heat as properly and successfully as it now provides the supply of water. The operation of telegraph and railway lines has a close analogy with the operation of the mail service, and is carried on in many modern States. However you or I may regard the questions involved in these extensions of public ownership and activity, we cannot deny that there is a very earnest body of men in every part of the country who are striving strenuously to promote such extensions. I think that the sentiment would be much stronger than it is if it were not for the generally inefficient and impure condition of the civil service of the States and cities which would be engaged in these enterprises. I have already mentioned the growing favor with which the merit system is regarded by the workingmen, and particularly by the more intelligent trades unionists. This is the class also to which the notion of public ownership of public utilities is most attractive. They and all others who may wish to extend the area of experiment in this direction are constantly more and more convinced that the merit system is the condition absolutely precedent to success in such experiments. Since that system is but the organized application of business principles to public business, it must be applied more strictly as the public business is extended.

The other class of enterprise to which I have referred is of a more imposing nature, and at the present moment excites vigorous differences of opinion and violent antagonism of sentiment. For the lack of a more precise term in the actual confused situation, let me call it "expansion." Whatever we may think of the policy or the righteousness of what has taken place or of the methods employed, and whatever restrictions we may wish to put on the processes of the future, we can hardly deny that to a certain important

degree we have as the gentleman from Arkansas remarked, "done expanded." We have taken over, beyond any reasonable expectation of retracing our steps, Hawaii, Puerto Rico, the region in the Ladrões in which the joyous Capt. Leary reigns; we have undertaken to organize a civil Government in Cuba in preparation for either independence or annexation; and, whatever we do in and with the Philippines we are sure to have a complicated and difficult job of administration on our hands for a long time. Whether we regard that task as imposed on us by duty and destiny, as the President regards it, and welcome the performance of it, or whether our view of the islands is that of Mr. Dooley—"I don't know; the Devil fly away with 'em"—we cannot shut our eyes to the fact that they will severely tax our capacity for efficient administration. And here again the merit system imposes itself. It will not be denied. No decently intelligent man facing the problem with some practical responsibility on his shoulders can fail to see that the old spoils methods will be very dangerous. I will not say that they will be fatal, for I recall what this Republic has accomplished in its career at home in spite of a more general and persistent domination of the spoilsman than I think will ever again be possible. But the peril would be very great. I believe that it would give pause to the hardiest and most greedy of politicians with actual responsibility. There is evidence of this in the course of the President. The kind of men he has chosen for civil work, whether from the army or outside of it, in the distant regions for the present intrusted to him has, on the whole, been of a much higher order than he has found it expedient to select at home. If in the domain of public affairs as in that of trade the demand tends to bring about the supply, we may reasonably expect that the principle of the merit system will gradually but steadily be extended in American administration. With that will come in some considerable degree the "emancipation of the voter." It is a question of the American conscience. Three-score years ago Mr. Emerson said to the merchants of Manchester: "That which lures a solitary American in the woods with a wish to see England is the moral peculiarity of the Saxon race, its commanding sense of right and wrong—the love and devotion to that—this is the imperial trait which arms them with the sceptre of the globe." We need not inquire too curiously as to the extent of the realm over which our own dominion is to extend, but we may be sure that within our old borders or beyond them to the uttermost ends of the earth it is by this "imperial trait," and this alone, that we can do a work worthy of free, honest, and sensible men.

EDWARD CARY.

## IN RE AUGUR.\*

## MEMORANDUM OF DECISION.

This is an application to admit to probate what is claimed to be a substantial copy of the will of Harriet M. Augur, the original will not being produced in court, but evidence being offered to show that such a will had been legally executed, but that it had been either lost or fraudulently destroyed.

The only evidence offered by the contestant was a copy of a writ and complaint, dated May 13, 1899, claiming an injunction, in an action brought by the proponent and others in the Superior Court against the contestant and others, admitted by the proponent to be a true copy of the original. The allegations of this complaint were

---

\*Decided in the Probate Court for the District of New Haven, Connecticut, March 13, 1900.

This case is interesting for the reason that it deals with substantially a new point of law, i. e., the legal effect of evidence showing that a lost will was last known to have been in the possession of another than the testator. Practically all the cases deal with the presumption of revocation arising where a lost will was last known to have been in the possession of the testator. In the very few cases where the lost will was out of the testator's possession, it is generally clearly shown that the will was so entirely out of the testator's possession that he could not destroy it *animo revocandi*, and remained so until his death. In none of the cases does the court carefully consider the question of the legal effect of proving that a lost will was last known to be in the possession of another than the maker, and in none of them do the counsel appear to discuss it. (See the cases cited in the body of the opinion.)

As might be inferred from the opinion the counsel for the proponent at the trial of the case claimed that the rule of law was as stated in Jarman on Wills I \*133, Woerner's American Law of Administration I, \*91, Greenleaf on Evidence II, §681 and Thornton on Lost Wills, §64.

These authorities state the rule to be that: If a will once executed is not found at its maker's death it is presumed revoked, "but that if the will is traced out of the deceased's custody it is incumbent on the party asserting the revocation to prove that the will came again into such custody or was destroyed by his direction" (Jarman as cited).

On this point Jarman cites *Colvin v. Fraser*, 3 Hagg. Eccl. Rep. 397; *Wynn v. Heveningham*, 1 Coll. 638, 639. Greenleaf cites Jarman, *Minkler v. Minkler*, 14 Vt. 245; *Helyar v. Helyar*, 1 Lee 472; *Lillie v. Lillie*, 3 Hagg. 184; *Lexley v. Jackson*, 3 Phillim 126, and *Jackson v. Betts*, 9 Cowen 208. Woerner and Thornton apparently rely on the case of *Dawson v. Smith*, 3 Houst. (Del.) 325.

Jarman's citation of *Colvin v. Fraser* on this point would seem to be due to a note to the case of *Lillie v. Lillie* in the 3rd of Haggard, which states the law in this way and gives *Colvin v. Fraser* as authority.

based on information furnished by the proponent and were verified by his oath.

The testatrix died August 28, 1898, leaving as her next of kin, her son, Jacob Heitman Augur, who died in March, 1899. Jacob P. Augur, the husband of Harriet M. Augur, and the father of Jacob Heitman Augur, died in 1879, leaving a will by which he gave to this son, his only child, one hundred dollars, and all the residue of his estate to his wife.

The proponent is a nephew of Jacob P. Augur, and a beneficiary under the alleged lost will of Harriet M. Augur, and the contestant is Marie E. Augur, widow and legatee of Jacob Heitman Augur.

It appears from the evidence of ex-Judge Lucius P. Deming, a practicing attorney, that in 1882 he was requested to draw a will for Mrs. Augur. He produced in court a pencil memorandum,

In that case the will was known to have been for nine years before he died in the testator's possession. In *Wynn vs. Heveningham* the will was found mutilated, and having been proved at all times to have been in the hands of a custodian, it was found by the court not the work of the testator. The other cases cited by Jarman, Woerner, Greenleaf, and Thornton will all be found to have been decided on another point except *Dawson v. Smith*. This, as indicated in the opinion above, is merely a charge to a jury, and the judge says the whole matter is a question of fact. Thus it is seen that the exception to the rule as stated has a very slender foundation in authority. Much apparently has been inferred from the statement that the presumption of revocation arises where the will has been "*traced into the testator's possession*." The opinion shows that in its bald form it cannot be correct.

The main rule or presumption as stated in the opinion and by Chancellor Walworth in the case of *Betts v. Jackson*, 6 Wend. 173 has its foundation in experience which teaches that the absence of a will is presumptive evidence of its revocation. This presumption, however, may be overcome by showing in any of a variety of ways that it is improbable that the will was revoked. This may be done by showing that the will was destroyed without the testator's knowledge (*Brown v. Brown*, 10 Yerg. 84), by showing that the testator's circumstances did not change after the making of the will, and that he seemed satisfied with the disposition he had made of his property. *Legarra v. Ashe*, 1 Bay (S. C.) 464; *McBeth v. McBeth*, 11 Ala. 596; *Foster's Appeal*, 87 Pa. St. 67; *In re Page* 118, Ill., 576; *Sugden v. Lord St. Leonards L. R.* 1 P. D. 154; *Southworth v. Adams Fed. Cas. No. 13,194*; *In re Steineke's Will*, 70 N. W. 59 (Wis.); *In re Lambie's Estate*, 56 N. W. 223; *Behrens v. Behrens*, 47 Ohio St. 343; *Collagan v. Burns*, 57 Me. 449; *Scroggins v. Turner*, 98 N. C. 135; *Eckersley v. Pratt L. R.*, 1 P. D. 281; *Minkler v. Minkler ut sup.*; by showing that it was out of the testator's possession and that he could not destroy it (see cases cited in the opinion); and finally by showing generally that the probability is that the will was not revoked (see cases above cited and *Welch v. Phillips*, 1 Moore P. C. 299). In effect the rule might be stated that the will is presumed revoked unless satisfactorily accounted for, or unless it is shown in some other way that the probability is it wasn't destroyed by the testator.

made by him at Mrs. Augur's residence, at her dictation, the day before the execution of the will.

He testified with particularity as to the execution of the will, and that the paper recently drawn by him, at the suggestion of the attorneys for the proponent, was merely an amplification, in the form usually employed in drawing wills, of the language more tersely but less technically expressed in the memorandum itself.

He testified that the will, when executed, was placed in an envelope endorsed "Will of Harriet M. Augur;" that it was handed by him to the testatrix, and by her to Mr. Willett Hemingway, one of the witnesses to the will; that he has never seen it since, but that he recently found this memorandum among his papers in unsuccessfully searching for a copy of the will, it being his custom to preserve copies of wills drawn by him. The memorandum reads as follows:

---

The famous case of *Sugden v. Lord St. Leonards ut sup.* amounts to this. See also the opinion in *Southworth v. Adams ut sup.*

The effect of the presumption is this: if there is no evidence to the contrary, the absence of the will establishes a *prima facie* case that it was destroyed *animo revocandi*; if there is evidence to the contrary, then the presumption is a page from the experience of the judges to be borne in mind by the trier in weighing the evidence (see Thayer, *Evidence at the Common Law* pp. 336, 346).

If this is the true scope of the presumption the exception cannot be correctly stated by these text-books. It would then be stronger than the rule. If it is not true that in all cases, under all circumstances, the absence of the will throws on the proponents the duty of showing the existence of the will at the testator's death, or its destruction without his knowledge and consent before his death, it cannot be true that merely to trace the will out of the testator's possession is enough to throw on the contestants the duty of showing its destruction by the testator or that it came again into his possession. In many cases as in the present, the tracing of the will into the possession of another might not raise any probability that the testator never got it again or that he did not revoke it. The custodian might be in daily intercourse with the testator, and other facts might develop which on the proponents' own evidence would so counteract the effects of the testimony as not to leave it weight enough to rebut the main presumption.

Moreover, any rule as to the effect of such evidence would seem needless. It needs no experience in dealing with wills to appreciate its weight. If a testator couldn't get at his will, he couldn't destroy it. That is common sense. Law on the subject is unnecessary.

The only case really out of harmony with the law as above stated is the case of *Sprigge v. Sprigge L. R., 1 P. D. 608*, where it is held that if the maker of a will becomes insane before death, and at his death a will known to have been made by him cannot be found, those contesting its probate must show its destruction while he was sane. This would seem inconsistent with the trend of the law and a broader statement than the case requires. It is easy to imagine cases in which its application would work hardship.—*Eds.*

"Will Harriet M. Augur Willet Hemingway Executor Pay all debts &c. Give Mary Augur Lane \$1000. in consideration of services. Give Hattie Mariah Augur Hollister \$1000. for name. Give F. H. U. Cemetery \$200. Give Jacob Hiteman Augur, son, \$10,000. In case his death give to Maria F. Augur, his wife. If both dead to children, if any. All rest of estate give & bequeath to brothers & sisters of husband Jacob P. Augur, by both wives, if any dead give portion to children of deceased if any Brothers & sisters &  $\frac{1}{2}$  brother and sisters to share alike."

I find from the evidence that Harriet M. Augur did legally execute a will in 1882, and that the memorandum itself, rather than the recently prepared so-called "copy," contains the substance of that will. It is claimed that this will was in existence at the death of Mrs. Augur, if not destroyed without her knowledge or consent before her death, and that it should now be established, proof of its contents having been produced. The vital question is: Was the will revoked by the testatrix before her death?

The mere absence of a will raises a presumption that it is revoked. In *re Johnson's Will*, 40 Conn. 587; *Colvin v. Fraser*, 2 Hagg. 266; *Betts v. Jackson*, 6 Wendell 173; *Newell v. Homer*, 120 Mass. 277; *Rice's American Probate Law* 248.

This presumption, however, is a presumption of fact rebuttable by evidence. But it is claimed that the presumption of destruction *animo revocandi* does not arise in this case because it is claimed that the deceased did not have ready access to her will, since by the evidence that the will was handed by her to Willett Hemingway immediately after it was executed, it has been "traced out of her possession."

While many cases are authority for the proposition that a will once executed, but not found at death, is presumed to have been revoked, if the testator had ready access to it, there are few decisions to support the bare proposition that no such presumption arises where the will was simply not in the possession of the testator.

Thornton in his work on *Lost Wills*, Sec. 64, prefers to state the law as follows: "It is the prevailing rule that if the will is not forthcoming at the death of the testator its revocation will be presumed, whether it was in his personal possession or in the possession of another; but in the latter instance the presumption is quite a weak one."

The early English cases referred to in some of the text books, as authority for the proposition that the burden of proof shifts to the

contestants to show revocation where the will is "shown out of the possession of the testator" or "traced out of the testator's possession," are at best but dicta. The American authority apparently relied on being *Dawson v. Smith*, 3 Houston (Del.) 335, which is not the opinion of a court of last resort, but merely the charge of a judge to a jury in a lower court.

This statement of the rule that the burden of proof shifts cannot be correct if the expressions "shown out of the possession of the testator" or "traced out of the testator's possession" are used merely in the sense of not being in his manual possession. It becomes important, therefore, to inquire what is meant by thus "tracing the will out of his possession." In the absence of direct authority on this point we must resort to the reason for the rule to guide in its construction. The ordinary presumption of the continued existence of that once found to exist, could not with safety be applied to the case of a will not found upon the death of the maker of it.

It is ordinary experience that wills, the legal execution of which necessarily involves more or less publicity, are frequently destroyed in secret, and but for the presumption of revocation which the law wisely raises, wills, in fact revoked, would often be admitted to probate, the intention of the maker being thwarted because of the comparative ease of proving that a will once existed and the corresponding difficulty of showing its secret revocation.

There can be no good reason why the same presumption should not arise even when the will is shown not to have been in the possession of the testator, provided he could have had access to it at any time. But if it be shown that the will was so deposited in the custody of another that the testator could not have had an opportunity to destroy it without the knowledge of the custodian, and if it appears that, so far as he knows, the testator did not secure access to his will before his death, there is every reason, in such a case, why this presumption of revocation should not arise, and why the burden of proof should be on the contestant to show that the will was revoked by the testator.

In most of the cases where it is held on this ground that the presumption of revocation is overcome, it appeared from the evidence, generally from the testimony of the custodian of the will, that the testator had not, and could not have had, access to it. *Hildreth v. Schillinger*, 2 Stockton (N. J.) 196; *Tynan v. Paschal*, 27 Texas 286 (84 American Decisions 619); *Schultz v. Schultz*, 35 N. Y. 653, 655; *In re Page*, 118 Illinois 576.



Not only has no proof been offered to show that Mrs. Augur did not at all times have ready access to her will, but having, as she did, intimate business relations with Mr. Willett Hemingway, the executor of her husband's will, it cannot, in the absence of any evidence to that effect, be presumed that she did not have access to her will during Mr. Hemingway's life, and if it was still in his custody at the time of his death, which occurred several years before her own, that she did not then take it into her own possession. Even the proponent himself must have assumed that she did take it into her possession, for it does not appear from the evidence that he thought that there was any occasion, before attempting to probate the will as a lost will, to seek out Willett Hemingway's personal representatives and through them to search for it among Willett Hemingway's papers.

Unless this view is taken, the evidence introduced by the proponent to show that all the papers of Mrs. Augur were kept in her safe deposit box in the Second National Bank, to which box they claimed that Jacob Heitman Augur had access, and their intimation that the will was in that box until destroyed, as they suggest by him, is meaningless. Moreover, in the fifteenth paragraph of the sworn complaint in the injunction case, before referred to, it is alleged by the proponent himself that the last will and testament of Harriet M. Augur was in her possession prior to her decease.

As far as appears, then, Mrs. Augur had "ready access," within the meaning of the law, to her will while it was in the possession of Willett Hemingway, and thereafter it is not traced out of her possession and control, whether she kept it in her own house or in her safe deposit box in the Second National Bank, and, therefore, in accordance with the authorities cited, the mere absence of the will at her death raises a presumption of its revocation. But the proponent claims that even if the presumption of revocation arises, it is a rebuttable one, and that it has in this case been rebutted by evidence.

Has, then, this presumption been thus rebutted? The proponent has offered evidence to show alienation of affection between the son and mother, abusive treatment of the mother by the son and expressions by her to others of displeasure with his conduct. They claim to have shown sufficient occasion for the will being drawn as it was, good reason for not changing it, and disposition and opportunity on the part of the son to destroy it. But neither disposition nor opportunity is enough to show that he did destroy it, however interested he might have been to do so, nor is the presumption of

revocation thereby overcome. *Collyer v. Collyer*, 110 N. Y. 481; *Knapp v. Knapp*, 10 N. Y. 276; *In re Kennedy's will*, *New York Law Journal*, December 23, 1899, page 989. Moreover, fraud, especially fraud involving crime, is never to be presumed. Besides if, as proponent has sworn in the injunction suit, he had already obtained from her transfers in his favor of all her real and personal estate, the very making of these transfers is an additional reason for supposing that the will was destroyed by the testatrix *animo revocandi*.

But it is urged that the declarations of the testatrix, during the last few years of her life, in regard to the disposition of her property, show that she treated her will as in force and unrevoked by her. Witnesses testified, for example, to such statements by her as that she had made her will and had remembered them, and that she had carried out her husband's wishes in regard to her estate; but with the exception of Mary Augur Lane, whose testimony does not relate to declarations of the deceased later than 1896, there is no witness whose testimony necessarily connects such declarations with the particular will executed in 1882, and unless the proponent relies on the will of Jacob P. Augur, as an expression of his wishes, there is no testimony to show what his wishes were. Certainly it is difficult to understand how in giving her son ten thousand dollars by her will, Mrs. Augur was carrying out the wishes of her husband, who, by his will, gave him only one hundred dollars. This of itself is enough to indicate that even if Harriet M. Augur was sincere in her declarations, made chiefly to the beneficiaries of the will sought to be established, she may not have been referring at all to the will executed in 1882. But even if she did refer to this will made in 1882, as late as June, 1898, she had ample time to revoke it before her death in August, 1898. As Surrogate Varnum said *In re Kennedy*, *supra*, "The mere fact of the execution of a will six or eight weeks before the death of the decedent will not affect the presumption that it was destroyed by him with the intent to revoke it. In many of the cases the interval which elapsed between the date when the will was last seen, or known to be in existence, and the date of the death of the decedent, was much shorter and in some cases only a few days."

In the opinion of this Court the presumption of revocation has not been overcome by the evidence. In other words the proponent has not satisfied the Court, by the testimony offered, that Harriet M. Augur's will, executed in 1882, was in existence at her death, or that it was destroyed without her knowledge or consent before her death.

It is well settled, as claimed in argument by counsel for the contestant, that no evidence of the contents of a lost will should be introduced until after evidence of an exhaustive preliminary search has been offered. This Court is far from being satisfied that such a search was made in this case, yet as no objection was made on that ground when the evidence as to the contents was introduced, I should not deny the application on that ground, without first giving the applicant an opportunity to introduce further evidence on that point, or to complete the search if it was still incomplete, but it is unnecessary to reopen the whole case for the purpose of receiving evidence on this preliminary question, in view of the conclusions arrived at by the Court on more decisive grounds. The application is denied.

LIVINGSTON W. CLEAVELAND, *Judge*.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 25 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,

ROBERT H. GOULD,

LESLIE E. HUBBARD,

WARREN B. JOHNSON,

ARCHIBALD W. POWELL,

GEORGE ZAHM.

## Associate Editors:

M. TOSCAN BENNETT,

JOHN HILLARD,

WILLIAM H. JACKSON,

CORNELIUS P. KITCHEL,

GEORGE A. MARVIN,

ROBERT L. MUNGER,

HENRY H. TOWNSEND,

THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

THE FOLLOWING RESOLUTIONS WERE ADOPTED BY THE TWO UPPER CLASSES, PUPILS OF THE LATE PROF. E. J. PHELPS.

WHEREAS, It has pleased God to remove from the post he has so faithfully occupied, Professor Edward John Phelps, the students in the Yale Law School desire to record their sense of the loss which they have sustained by his decease, and of the still heavier loss sustained by those who were nearest and dearest to him; and, therefore, be it

*Resolved*, That it is but paying a grateful tribute to his memory to say that this event calls us to mourn for one who was in every way worthy of our respect and regard, whose kindly instruction, clear as it was profound, will ever be among the most cherished recollections of our Law School work; a citizen whose upright and noble life will ever afford an inspiration to us; and

*Resolved*, That the heartfelt sympathy of his pupils in the Yale Law School be extended to the members of his family in their affliction, and that a copy of these resolutions be transmitted to Mrs. Phelps in token of our affectionate respect for a good man and great teacher gone to his rest.

## INTERNATIONAL LAW—PRIZES.

It is rather exceptional to find actual adjudication upon questions of international law, and were it only for this fact, the recent decision of the United States Supreme Court, in the case of *In re Pughette Habana, The Sola*, 20 Sup. Ct. Rep. 290, would be of interest. But the case presents a point which has very seldom arisen, and about which there is much diversity of opinion, thus making it of particular interest. It arose out of the seizure during the recent war with Spain, of certain fishing vessels flying the Spanish flag, manned by Spaniards, but carrying no arms, and engaged only in the peaceful trade of fishermen. These vessels were condemned as prizes of war and the Supreme Court now holds their condemnation unlawful. Fuller, Harlan and McKenna, J. J., dissenting.

The question involved in this case is dependent directly upon the development of international law. It touches upon just that period in the development of a rule of law where it merges from the state of comity and custom into the actual embodiment as a recognized rule. In the early days it was a matter of comity to except fishing smacks from capture. They were the means of providing sustenance for the peasant population of a nation, and for that reason were looked upon with favor. This view was held as early as 1784, during the difficulties that arose between England and Holland. *2 Code Des Prizes* 721-901, and again during the Portugal-French troubles in 1801. *2 De Cussy Droit Maritime* 166. It was then distinctly recognized as a rule of comity and not of legal decisions, and the dissenting justices in the present case still hold to this view. But in the opinion of the court exemption of fishing smacks from capture can no longer be considered a matter of comity, but a rule of international law, to be recognized and sanctioned as such. Treating this exemption as a matter of comity possesses many obvious advantages, the surrender of which was not, perhaps, altogether wise. Yet so uniform and oft repeated does this custom seem to have been, and so in line with the general tendency of international law in its relation to the government of war, that the correctness of the court's decision can hardly be questioned.

## CONSTITUTIONAL LAW—INTERFERENCE WITH INTERSTATE COMMERCE BY QUARANTINE REGULATIONS—PARTIES.

The Supreme Court in deciding the case of *State of Louisiana v. State of Texas et al.*, 20 Sup. Ct. Rep. 251, permits legal uncertainty to still obscure the division line at which internal police powers and

the regulation of interstate commerce overlap. The facts reveal a unique question of law. We find a complaint held demurrable in which the Governor and Health Officer of Texas, empowered by legislative authority to regulate quarantines, are alleged as unlawfully restricting interstate commerce by placing an embargo on all goods from New Orleans, under pretext of quarantine regulations because of a single case of smallpox in that city, but ulteriorly for the purpose of excluding Louisiana products for the benefit of home producers. Chief Justice Fuller, writing the opinion of the court, holds the alleged damage a grievance to the individual merchants, and not to the State. There can be no doubt of the correctness of this decision; nevertheless, the question remains: May a State at its pleasure exclude such interstate commerce as it chooses merely by advancing as a reason (either bona fide or by way of pretext) that the products are excluded as a police regulation for the health of its people. The present decision considered in connection with the 11th amendment to the Federal Constitution and the decision of the Supreme Court in the case of *State of New York v. State of Louisiana*, 108 U. S. 76, acquaints us with the fact that the inability of the State of Louisiana to be a proper party plaintiff in the present case is shared also by the particular merchants aggrieved, in consequence of their incapacity to sue a sovereign State. And further, the law passed by the Texas Legislature giving certain officials discretionary power to regulate quarantines is perfectly valid as a police regulation. *New York v. Mich.*, 11 Pet. 102, Story Const. L., 5th Ed., Vol. 2, 22 n. The wrong lying in the action of the officers in its enforcement.

A substitution of the officers instead of the State as respondents would then permit the individual merchants to bring their bill. The only difficulty remaining being the discretionary public character of respondents' official duties. But if the embargo be so unreasonable as to amount not to misdirected discretion, but to a wilful and malicious act, under pretext of discharging official duty, such officials are held amenable to suit for damages or an injunction. *Cooley on Torts*, 1880 Ed. 378, the act being "colore officio;" *Perry v. Reynolds*, 53 Conn.

Still the question remains if bona fide yet unreasonable police regulations interfere with interstate commerce, do the courts afford relief? The strongest argument for the negative of this question is found in the oleomargarine case, 127 U. S. 678, in which case the Supreme Court refused to inquire into the reasonableness of a law interfering with interstate commerce in forbidding the sale oleo-

margarine as a police regulation in protection of health, even though it was shown that oleomargarine was a healthful food. Judge Dillon's criticism of the case is very severe, declaring such a decision enough to make one's blood tingle. *Dillon Mun. Cor.*, p. 211 n. However, the better rule is set forth in a number of well considered cases discussed in the case of *Minn. v. Barber*, 136 U. S. 313. In this case an act providing for the inspection of cattle, sheep, etc., before killing was declared void as an unreasonable police regulation interfering with interstate commerce, the court making special inquiry into the reasonableness of the regulation. The weight of authority seems clearly to support the proposition that every citizen of the United States has a right to export his goods into a sister State, unless it interferes with *proper* police regulations of such State, without regard to what that State may consider a proper regulation.

Hence, in the present case, even though the Texas officials act bona fide and in the exercise of discretion, still, it seems, if the regulation be unreasonable, the New Orleans merchants might file a non-demurrable bill, alleging these facts, as the regulation must be subjected to a test of reasonableness by the court, and not determined by the bona fide exercise of State officials' discretion.

Justice Brown, in his concurring opinion, also suggests that the State of Louisiana might maintain such a bill were the embargo against the products from the entire State.

"SURVIVAL ACTS"—INSTANTANEOUS DEATH—AMOUNT OF DAMAGES.

In the case of *Broughel v. Southern New England Telephone Company*, 45 Atl. Rcp. 435, the Supreme Court of Connecticut has established the doctrine that instantaneous death does not prevent the personal representative of the deceased from recovering substantial damages for his intestate's death occurring through defendant's negligence. The Connecticut statute belongs to that class of acts which have been called "survival acts," *i. e.*, acts providing that decedent's cause of action shall survive to the administrator or beneficiaries as distinct from those acts which create a new right of action to the beneficiaries for their loss. Under the latter class of actions, of course, the period within which death results cannot affect the cause of action, but under the "survival acts" Massachusetts and Mississippi hold that no recovery can be had where death is instantaneous, as there is no cause of action to survive an instantaneous death. This objection could be of no weight in Connecticut, as the statute was amended so that the cause of action

should survive whether death was instantaneous or not, or, in other words, so that the administrator could recover at least nominal damages, even where no damage could be proved. Under the "survival acts" it has generally been held that the administrator could recover only the damages the decedent could have recovered on account of his sufferings, but in this case, although the trial judge found, as a matter of fact, that "death was instantaneous, and he suffered no pain or sensation, and never regained consciousness," and therefore awarded nominal damages, the judgment is set aside and a new trial granted for ascertaining and assessing the quantum of damages. The upper court shows conclusively that under the Connecticut statute the cause of action survives even where death is instantaneous, and the general approval with which this has been received by the press, shows in how close touch the bench is with the best public opinion.



## RECENT CASES.

**CARRIERS—COMPETITION—INTERSTATE COMMERCE ACT—LONG AND SHORT HAUL CLAUSE—LOUISVILLE & NASHVILLE R. R. v. HENRY W. BEHLUER**, 20 Sup. Court (Oct. term) 209.—*Held*, that where carriers are subject to the Act to Regulate Commerce, that competition which is material can be taken into consideration for the purpose of determining the existence of a dissimilarity of circumstances and conditions within the meaning of P. 4 of the Act, although that competition does not originate at the initial point of traffic.

The Circuit Court of Appeals decided that according to the Long and Short Haul Clause in P. 4 (24 Stat. at L. 379), the plaintiff could not charge more for the shorter haul than for the longer, as the competition did not originate at the initial point of carriage. This interpretation conformed with that of the I. S. C. C., but the latter has since altered their view to the one taken by the Supreme Court in *I. S. C. C. v. Alabama M. R. Co.*, 168 U. S. 144: that if the competition is material it does not matter whether it arises at the point of shipment or point of delivery. And it is not necessary that the competition should be of such a nature, that should one line not carry the goods between the two points, the other competing line would do so.

**CARRIERS—DUTY TO RECEIVE—FREIGHT TO BE CARRIED OVER CONNECTING LINE—SEASONGOOD ET AL. v. TENNESSEE & O. TRANS. CO.**, 54 S. W. (Ky.) 193.—Defendants, who owned a boat which was accustomed to carry freight, refused to carry goods of plaintiff, because they were for a point beyond their route. *Held*, a carrier has no right to refuse to receive freight because it is destined to a point beyond its own line. A contract by one carrier with another that it will not receive goods destined to a point beyond its own line is illegal. Du Relle, J., dissents.

The correctness of this decision is open to doubt; the court cites no cases to uphold this doctrine, while in the case of *The Atchison, Topeka & Santa Fe R. R. Co. v. Denver & New Orleans R. R. Co.*, 110 U. S. 667, it is laid down most emphatically that: "At common law a common carrier is not bound to take goods for a point beyond its own line." From this case it is evident that the Kentucky doctrine is opposed to that laid down by the U. S. Supreme Court.

**CARRIERS—FREIGHT—DELIVERY—NOTICE TO CONSIGNEE—DIAMANT v. LONG ISLAND R. CO.**, 62 N. Y. Sup. 519.—Defendant agreed by bill of lading to transport merchandise and "tender it to the consignee." The bill also stated that "carriage should be complete and charges earned," when merchandise has been held a reasonable time without notice, subject to owner's order. The goods were held, but no notice was given to consignee. Consignor sued for value of goods. *Held*, that completion of the carriage did not dispense with defendant's express obligation to tender; though notice would have been sufficient to discharge him. Evidence of a custom dispensing with tender of delivery held inadmissible. MacLean, J., dissenting.

Carrier's liability as insurer when no notice is given is strictly held by the New Hampshire rule, which is followed by thirteen States, Canada and England. *Moses v. Boston, etc., R. R. Co.*, 32 N. H. 523; *Sherman v. Hudson R. R. Co.*, 64 N. Y. 354. The Massachusetts rule is that carrier's liability ceases on arrival and storage in a proper warehouse without notice, and carrier is then liable as warehouseman. Eleven States follow this rule. 5 A. & Enc. 277 (2d. ed.); *Norway Plains Co. v. Boston, etc., R. R. Co.*, 1 Gray (Mass.) 274; *Rothschild v. Michigan Central*, 69 Ill. 164.

**CHARITIES—SOCIETIES FOR THE PREVENTION OF CRUELTY TO CHILDREN—PUBLIC CONTROL—PEOPLE EX REL. STATE BOARD OF CHARITIES V. NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, 55 N. E. 1063 (N. Y.).**—The New York Society for the Prevention of Cruelty to Children was incorporated for the enforcement of all lawful means necessary to that end. The State Board of Charities, created for the purpose of visiting and inspecting all charitable institutions within meaning of court, claimed the right to include the New York society within its jurisdiction. *Held*, that Society for Prevention of Cruelty to Children is organized for enforcement of criminal law, and does not come under jurisdiction of State Board of Charities. Martin, Haight, Vann, J. J., dissenting.

The practical value of this case lies in the distinction it makes between charitable institutions in their true legal meaning and institutions which, in a general sense, may be called charitable. An institution is not necessarily of a charitable nature because it has the capacity to take and administer gifts, nor can it be called charitable if incidentally it does something toward the alleviation of human misery and suffering. The term "Charitable Institution" can be legally applied only to those institutions, public or private, that give public pecuniary relief in that form commonly called "charity."

**CONSTITUTIONAL LAW—DISCRIMINATION IN FAVOR OF RESIDENT CREDITORS—BLAKE ET AL. V. MCCLUNG ET AL., 20 Sup. Ct. Rep. 307.**—A law giving priority to resident creditors of a corporation doing business in a State, *Held*, unconstitutional as depriving non-residents of the privileges and immunities of citizens of a particular State, and also as a denial of the equal protection of the law.

A mere compliance by the courts with the requirements of statutory enactments is not due process of law, but the statutes themselves must affect residents and non-residents alike. *R. R Co. v. Baty*, 6 Nebr. 37; *Taylor v. Porter*, 4 Hill (N. Y.) 140.

**CONSTITUTIONAL LAW—STATE FISHERIES ACT—REGULATION OF COMMERCE—DUE PROCESS OF LAW—POLICE POWER—PEOPLE V. BUFFALO FISH CO., LTD., 62 N. Y., Sup. 543.** *Held*, that Laws 1892, C. 488, §§ 110, 112, making it a misdemeanor to catch, kill, or have in one's possession certain varieties of fish during certain periods of the year, and imposing a penalty for its violation, so far as they affect the possession and right of sale by a citizen of this State of fish imported by him from a foreign country, on which a customs duty has been paid, are in conflict with the power of Congress to regulate commerce, and to such extent are void; that these laws making it a misdemeanor to have in one's possession such varieties of fish during such periods, and imposing a penalty for the violating, so far as they affect the possession and sale of fish imported from without the State are unconstitutional, as depriving a person of his property without due process of law; that such act cannot be upheld as a lawful exercise of the police power of the State, on the ground of providing for the propagation and preservation of game fish in the waters of the State. Disapproving, *Phelps v. Racey*, 60 N. Y. 10.

The weight of authority seems to indicate that the States have the right to make and enforce such laws. *Magner v. People*, 97 Ill. 331; *exparte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129. *State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98, and *Territory v. Evans*, 2 Idaho 634, agree with the above case. These State statutes are supported as being a valid exercise of the police power in *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566. The possession of game lawfully taken and killed is held no crime in *State v. Bucknam*, 88 Me. 385, 51 Am. St. Rep. 406, and *State v. Parker*, 89 Me. 81.

**CONSTITUTIONAL LAW—INTERFERENCE WITH INTERSTATE COMMERCE BY QUARANTINE REGULATIONS—PARTIES—STATE OF LOUISIANA V. STATE OF TEXAS,** 30 Sup. Ct., Rep. 251.—The State of Texas passed an act, under pretext of a quarantine regulation, excluding all goods from the State coming from New Orleans. In an action to test the validity of such act. *Held*, that the State of Louisiana could not maintain the suit, not being a proper party. See Comment.

**CONSTRUCTIVE FRAUD—BURDEN OF PROOF—ROSEVEAR V. SULLIVAN ET AL.,** 62 N. Y. Supp. 447.—Where an aged woman, mentally and physically weak, grants her property to one in possession of all his faculties, *held*, that the burden of proof that the transactions was fair is on the grantee, and if there be failure in this, constructive fraud will be presumed. *Green v. Roworth*, 113 N. Y. 462.

Woodward, J., dissented on the ground that sanity and ability to transact business are the ordinary conditions of grown men, and he who attacks the ability of a grantor to execute a deed, must prove the lack of ability by a preponderance of evidence. *Jones v. Jones*, 137 N. Y. 610. Where, as in this case, there is no fiduciary relation, influence must be proved by extrinsic evidence. *Fisher v. Bishop*, 108 N. Y. 25.

**CONTRACTS REQUIRING CLAIM FOR DAMAGES TO BE PRESENTED WITHIN CERTAIN TIME—DAVIS V. WESTERN UNION TEL. CO.,** 54 S. W. 849 (Ky.).—In an action to recover damages for failure to deliver a telegram, *held*, that the stipulation in the contract for the transmission of the message requiring any claim for damages to be presented in writing within 60 days after the message is filed, is void as against public policy.

This decision is in accord with the rule laid down in *Enbank et al. v. Western Union Tel. Co.* 38 S. W. 1068 (Ky.); *Dryling v. The N. Y. and Wash. Print. Tel. Co.*, 35 Penn. St. 298. But the contrary view has been held in some states and in the Supreme Court of the United States on the ground that such stipulation is reasonable and obligatory. *Bearsley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Dougherty v. Western Union Tel. Co.*, 54 Ark. 221; *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1.

**CONTRACT—SUBROGATION—REFORMATION—ACCOUNT BOOKS—FALSIFICATION BY CASHIER—STATE BANK OF PIKE V. NAFUR ET AL.,** 61 N. Y. Sup. 779.—Plaintiff purchased assets of a firm and contracted to pay all of defendant's obligations, "as shown by the books of said firm." Five years later they discovered that cashier had falsified a particular book, on which they had based their previous calculation, and that they had paid out more than they supposed themselves liable to pay. *Held*, That where the defendants had made no fraudulent representations and there was no mistake by either party as to the terms of the contract, they could not recover the money in equity.

The plaintiff's contention for relief under the equitable doctrine of subrogation on the ground of mistake of fact, can not be allowed in the case at bar because the plaintiff "had the means of correct information within his power, but negligently omitted to avail himself of them." 24 *Am. and Eng. Ency. of Law* 284. The books were all in the hands of the plaintiff and an examination of them would have disclosed the error, as only one had been falsified. *Story on Equity* discusses this matter, § 105. That equity will not reform a contract for a mistake of law is well established, but it will grant a reformation if there is a *mutual* mistake of fact. However, in the case under consideration the mistake was unilateral, nor was this by reason of any fraudulent representations on the part of the defendant.

**DANGEROUS MACHINERY—WARNING EMPLOYEES—PRIOR ACCIDENTS—WYMAN V. ORR ET AL,** 62 N. Y. Supp. 195.—Plaintiff, a boy of 15, was employed in a

paper mill to remove broken paper from sets of rollers. Electricity generated attracted the paper so strongly that it was drawn in between the rollers and his arms were crushed. In the trial plaintiff endeavored to introduce evidence of similar prior accidents in the same place, but it was excluded. As this was an appeal from judgment on direction of a verdict, the court considered the appellant entitled to most favorable inferences from evidence given and also from evidence erroneously excluded. *Held*, That it could not be said as matter of law that the accident was caused by an obvious danger, the risk of which the employe assumed. Kellogg, J., dissented.

To the general rule that a servant assumes the ordinary risks of his employment, and even the risks from unsafe machinery which are apparent and obvious, we find the exception that the master is liable if he exposes persons to perils which they, by reason of youth, do not comprehend. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Union Pac. R. R. Co. v. Fort*, 17 Wall. 553, 14 A. & E. Enc. 892; *Illinois, etc., R. R. Co. v. Welch*, 52 Ill. 183; *Malone v. Hawley*, 46 Cal. 408.

**DEEDS—MORTGAGES—WARRANTY—HOPPER v. SMYSER—SMYSER v. HOPPER**, 45 Atlan. 206.—The habendum clause in a deed of conveyance declared the property subject to a mortgage, but in the warranty immediately following the mortgage was not expressly excepted. *Held*, that the failure to except in the warranty did not make the grantor liable for the mortgage, because the habendum clause limits the estate and interest which is described as conveyed, and the covenant of warranty could not enlarge an estate and interest thus limited.

The contrary view is held in some States, although an outstanding mortgage is not a breach of the covenant of warranty, yet the covenant is an undertaking that the covenantee shall at all times enjoy the land free from all such encumbrances existing at the time of the grant. 8 A. & E. Encycl. of L., 2d ed. 97. *King v. Kilbride*, 58 Conn. 109, and cases cited.

**DIVORCE—ADULTERY—CONDONATION—GEOGER v. GEOGER**, 45 Atlan. 349 (N. J.).—In divorce proceedings against a woman for adultery, where she proved forgiveness by words on the part of her husband, and also his promise to receive her back into his home and convey property to her; this was held by the court to be an insufficient condonation of her offense by the husband.

This decision is contrary to the rule in *Shackelton v. Shackelton*, 48 N. J. Eq. 364, which held "that forgiveness may be expressed in words, and possibly by conduct without words, to show that the injured party meant to blot out the whole past."

The court based its decision upon *Teats v. Teats*, 1 S. W. and Tr. 334, which held that "words, however strong, can at the highest be regarded only as an imperfect forgiveness, and must remain incomplete, unless followed by a reconciliation."

Condonation requires reunion and reconciliation; a restoration of the offender to all the marital rights. 9 A. and E. Ency. Law, 222. The husband in this case showed only an inclination to condone the offense.

**DIVORCE—ADULTERY—CUSTODY OF CHILDREN—OSTERHOUDT v. OSTERHOUDT**, 62 N. Y., Sup. 529.—*Held*, that the court will not disturb a decree granting the custody of children to the wife from whom the plaintiff had obtained a divorce, on the ground that she had procured the divorce in a foreign jurisdiction and remarried, where no other misconduct is shown, and she has a comfortable home and the children are attached to her,

The New York court will not recognize the defendant's North Dakota divorce, and views her subsequent marriage as adultery. But it leaves her the custody of the children on the ground that her only misconduct depended on the legal question of the jurisdiction of the North Dakota courts in granting her a divorce, and that she was the better fitted for their custody. Barrett and

Van Brunt dissenting on the ground that this is a momentous departure from precedent to give custody of children to the guilty party; that her divorce being not only void from want of jurisdiction, but inherently fraudulent; and that her home is thus not a proper place for the children. The dissenting opinion agrees with *McGown v. McGown*, 19 N. Y. App. Div. 368, the facts of which are the same. Generally, a mother, guilty of adultery, is not a fit custodian for her children (see cases cited, *Amer. Eng. Ency. of Law*, 2d ed., 9-689).

The custody of children is given to the mother who has been guilty of adultery in *Com. v. Addicks and wife*, 5 Binn (Pa.) 520, and *Haskell v. Haskell*, 152 Mass. 26.

**ENTRAPMENT—PUBLIC POLICY—WALTON v. CITY OF CANON CITY**, 59 Pac. Rep. 841 (Colo.).—*Held*, where a city marshal instigated a third party to procure the violation of a liquor law, public policy would not permit the collection of the penalty. The marshal's duty was to discover such violation.

But where a detective, without orders from the prosecuting attorney, procures a similar violation, it was held to be no defense. *People v. Curtis*, 54 N. W. Rep. 767 (Mich.).

**ESTATES—DEVISE UPON CONDITION—VALIDITY—WRIGHT ET AL. v. MAYER**, 62 N. Y. Sup. 610.—Plaintiff, while living separate from her husband, took land under a devise which provided that, if they should resume their marital relations, the estate so devised should cease and become vested in the testator's executors in trust to pay the income to the wife for life, and on her death to pay the principal to her children. *Held*, that the condition was valid.

This condition is considered valid by a divided court, on the authority of *Cooper v. Remsen*, 5 Johns Ch. 459. This seems to be correct, for while it is well settled that conditions annexed to a gift, the tendency of which is to induce husband and wife to separate or be divorced, are held void on the ground of public policy, even *Whiton v. Snyder*, 54 Hun. 552, which is here quoted against the validity of the condition, says "a provision for destitute wife might be humane" and valid.

**HABEAS CORPUS—PRISONER HELD BY EXTRADITION WARRANT—FUGITIVE FROM JUSTICE—IN RE TOD**, 81 N. W. 637 (S. D.).—Application for a writ of habeas corpus, the petitioner being held under an extradition warrant. On the hearing it was clearly shown, that the prisoner had come to South Dakota from Nebraska at the request of the party he had defrauded, that proceedings were instituted against him in Nebraska by the injured party, in pursuance of which the petitioner was held under an extradition warrant. *Held*, that the petitioner was not a fugitive from justice, and that he should be discharged from custody.

The motives that induce the withdrawal from the State are immaterial, where a person who has committed a crime departs without awaiting its results. (*In re White*, 55 Fed. Rep. 54; *State v. Richter*, 37 Minn. 436). But the mere fact that the accused left the State is not enough of itself to make him a fugitive from justice. All the circumstances in relation to the commission of the offense, the time and manner of leaving the State, should be inquired into. (*Amer. and Eng. Ency. of Law* (new ed.), Vol. 12, p. 602; Opinion of Governor Fairfield in case of *Certain Fugitives* (Me.), *Spear on Extradition* (3d ed.) 381; Opinion of Governor Collum in *Goffigan and Merrick's case*, *Spear on Extradition* (3d ed.) 385, 713.

**HUSBAND AND WIFE—ACTION FOR ALIENATING HUSBAND'S AFFECTION—CROCKER v. CROCKER**, 96 Fed. 702.—Action by a wife for the alienation of her husband's affection. No charge was made in the declaration of criminal conversation. *Held*, that a wife cannot, under the laws of Massachusetts, maintain an action against a third person for merely alienating the affection of her husband.

This decision seems to be based on the principle that the inferior has no right in the superior, and therefore the inferior can suffer no loss or injury. 3 *Bl. Comm.* 143. The common law gave to the wife no action for alienation of her husband's affection. *Duffies v. Duffies*, 76 Wis. 374; *Doe v. Roe*, 82 Me. 503. In some jurisdictions, however, the courts recognize that a wife has a right to her husband's society and affection, and, therefore, in a case like the present, a right of action. *Foot v. Card*, 58 Conn., 1. 18 *Atl.* 1027; *Warren v. Warren*, 89 Mich. 123; *Lynch v. Knight*, 9 H. of L. Cas. 589. Lord Campbell said that the wife might have action for the loss of the consortium of her husband. Statutes in this country have so modified the law that where a married woman may sue by herself for personal injuries, she can sue for loss of consortium of her husband. *Bennett v. Bennett*, 116 N. Y. 584; *Bassett v. Bassett*, 20 Ill. App. 543; *Clark v. Harlan*, 1 Cin. Rep. 418; *Leaver v. Adams*, 19 *Atl.* 776; *Westlake v. Westlake*, 34 Ohio St. 621; *Mehehoff v. Mehehoff*, 26 Fed. Rep. 13.

**INSURANCE—CHANGE OF TITLE—NOTICE—WHITNEY V. AMERICAN INSURANCE CO. ET AL.**, 59 Pac. 897 (Col.).—Action brought by the mortgagee to recover the amount of an insurance policy. A mortgage clause in the policy provided "that the mortgagee or trustee shall notify this company of any change of ownership \* \* \* which shall come to his knowledge." One B holding a general power of attorney for C, requested S, the owner of the insured property to make a deed of the property to C, which he did, and B had the deed recorded. Before C had accepted the conveyance, the building on the premises was destroyed by fire, whereupon he refused to accept. B immediately reconveyed the property to S. *Held*, that there was no change of ownership in the property which necessitated notice to the insurer.

The question in this case was whether the handing of the deed to B constituted a delivery. The test of delivery is: Did the grantor by his acts or words intend to divest himself of the title? If so, the deed is delivered. *Austin v. Tendall*, 2 M. S., Arthur, D. C. 362. Generally speaking the delivery of a deed to an agent appointed by the vendee therein to receive it is a delivery to such vendee. *Soward v. Moss*, 78 N. W. 373 (Neb.). In the case under review the court seems not to have regarded B as an agent of C, although he held a general power of attorney from him. Temple, J., dissenting.

**INTERNATIONAL LAW—PRIZES—IN RE PUGNETTE HABANA, THE SOLA**, 20 Sup. Ct. Rep. 290.—*Held*, vessels flying the enemy's flag engaged in coast fisheries, but carrying no arms, are not subject to capture. See Comment.

**INTERSTATE COMMERCE—STATE LAWS AFFECTING—LICENSE TAX IMPOSED BY CITY.—PASST BREWING CO. V. CITY OF TERRE HAUTE ET AL.**, 98 Fed. Rep. 330.—The common council of Terre Haute, under authority of the Legislature, passed an ordinance imposing a license tax of \$1,000 annually upon every person, corporation or firm maintaining a brewery, depot or agency within the limits of said city. The complainant maintained a depot in the city for storing its goods until they could be delivered, but had in the State of Indiana no brewery or place of manufacture for its goods. The complainant sought an injunction to restrain the enforcement of the ordinance chiefly on the ground that it is in conflict with the commerce clause of the Constitution. *Held*, that such a license tax is invalid, being a tax on interstate commerce, and not an exercise of the police powers of the state within the terms of the Wilson Act (26 Stat. C. 728).

The question is here considered as to the right of a state or city to tax the product of another state coming into it. The Supreme Court has decided that a state may impose a license fee upon intoxicating liquors, brought in from another state, when this license is for the purpose of regulating and controlling

the importation and sale, without violating the Constitution. *Hinson v. Lott*, 8 Wall U. S. 148; *License Cases*, 5 How U. S. 504. A license is for the purpose of control, supervision, or regulation of some act or thing, and not for revenue, for in such a case it is a tax. *Ash v. People*, 11 Mich. 347. *In re Wan Yin*, 22 Fed. Rep. 710. In the present case there was no evidence in the record that any provisions were made for the supervision, control, or regulation of such breweries, depots, or agencies. Therefore this assessment was a tax for revenue, outside the police powers of the state, and contrary to the interstate commerce clause of the constitution.

JUDGMENT AGAINST DECEDENT—IMPEACHMENT—ACTION BY HEIR—KAYES ET AL. V. VICKERY ET AL., 59 Pac. 628 (Kan.). *Held*, that at common law a judgment against a dead person is absolutely void and may be collaterally impeached by the heirs. Nor does it make any difference that service may have been obtained or the suit commenced before the death of the defendant.

There seems to be a wide diversity of opinion by the courts on this question. In the greater number of cases the rule appears to be that a judgment of the court rendered when one of the original parties was dead is voidable only, and can not be collaterally impeached, *Knott v. Taylor*, 99 N. Car. 511. In the case under discussion, the court confesses that its judgment was rendered "upon what appeared to be the reason and principle of the question and less upon the authority of the adjudged cases." There is, however, no lack of authority for this view, since in a number of states it has been held that a judgment against a decedent is absolutely void. *Life Association v. Fassett*, 120 Ill. 315.

LARCENY—GREEN GOODS—PEOPLE V. LIVINGSTONE, 62 N. Y. Supp. 9.—Prosecutor gave \$500, with the expectation of receiving \$3,000 counterfeit money. *Held*, if prosecutor parts with his property for an unlawful purpose, no prosecution for false pretenses can be sustained. *McCord v. People*, 46 N. Y. 470.

The court regrets that the defendant must be given a new trial and suggests that the Legislature alter the rule in *McCord v. People*, supra. There is a provision in the Penal Code for the punishment of "green goods" offenders, but prosecution under it is difficult owing to its technicalities.

LIFE INSURANCE—CONSTITUTIONAL LAW—VALIDITY OF STATUTE AFFECTING BUSINESS OF LIFE INSURANCE—MERCHANTS' LIFE ASS'N V. YOAKUM, 98 Fed. 251.—A statute in Texas allows a policy holder in a life insurance company to recover the amount of his policy and 12½ interest thereon, if the policy be not paid by the company within specified time after demand made. *Held*, this statute is valid and not in violation of the 14th Amendment.

The purpose of this statute is not to compel Life Insurance Companies to pay their debts, but to secure a proper degree of care on their part in writing policies. That the enactment of such a statute is but the valid exercise of the legislative power seems most reasonable. Foreign Insurance Companies, as between insurer and insured, are by far the stronger, and this statute is manifestly for the protection of the weaker. It is not an arbitrary classification, nor is it discriminative, but, in its application to all such companies, seeks only to subserve the public interests. *Railway Co. v. Matthews*, 165 U. S. 1; *Casualty Co. v. Allibone*, 90 Tex. 660, 40 S. W. 339, decide the validity of similar statutes and are in accord with the present decision.

MALICIOUS PROSECUTION—DAMAGES—PLEADING—EVIDENCE—EVINS V. METROPOLITAN ST. RY. CO., 62 N. Y. Sup. 495.—In an action for malicious prosecution and false imprisonment the complainant failed to allege any special damages to his business as a lawyer. *Held*, that it was error to admit evidence of the plaintiff's loss of business subsequent to the arrest. Goodrich, P. J., dissented.

Some courts hold that allegations of special damage must be made in the pleadings, especially where the earning power is extraordinary. *Baldwin v.*

*Western R. Corp.*, 4 Gray (Mass.) 333; *Jostin v. Grand Rapids Ice Co.*, 50 Mich. 516. But it is also held that the loss of earnings and business engagements is the necessary result of personal injuries and need not be specially pleaded. *Luck v. Ripon*, 52 Wis. 200; *Ehrgott v. New York*, 96 N. Y. 264.

**MARINE INSURANCE—INSURANCE ON PROFITS ON CARGO—TOTAL LOSS—ABANDONMENT—PORTION SAVED DELIVERED TO OWNERS AS PART PAYMENT—CANADA SUGAR REF. CO. v. INSURANCE CO. OF NORTH AMERICA**, 20 Sup. Court Rep. 239.—Petitioners insured the profits on a cargo of sugar, against total loss only, in the Atlantic Mutual Insurance Co., and shortly afterwards took out another policy in the Insurance Co. of N. A., which is the respondent in this suit. The ship while on her voyage stranded and was abandoned to the Atlantic Co., which succeeded in saving about 300 tons of the sugar, which they sent to Montreal and turned over to the Sugar Company as part payment of their total loss policy. The other Company refused to pay, on the ground that there was not a total loss of goods. *Held*, a recovery of insurance on profits of a cargo under a policy insuring against total loss only, and valuing the profits at the sum insured, will not be prevented where the cargo was abandoned as a total loss, by the fact that other insurers of the cargo subsequently saved a portion of it, and then delivered it to the former owners in part payment, on a settlement of their liability for the total loss of the cargo.

There seems to be some doubt if the words "total loss only" will preclude the insured from recovering where there is simply a constructive total loss. Parsons considers it doubtful (*2 Parsons on Contracts* 389), *Thomson v. Royal Exchange Ass. Co.* 16 East 219, and contra, *Hubner v. Eagle Insurance Co.*, 10 Grey 131. This court, however, holds that there was a total loss as to the owners, since they had abandoned the cargo to one of the underwriters. No formal notice of abandonment was necessary, since, "Actual abandonment dispenses with formal notice."

**MARRIED WOMEN'S ACT—COVERTURE—STATUTE OF LIMITATIONS—BLILER v. BOSWELL**, 59 Pac. Rep. 798 (Wyo.).—*Held*, upon reason and authority a statute permitting a *feme covert* to sue and be sued alone, does not by implication do away with disability of coverture that excepts her from the statute of limitations.

The weight of authority inclines the other way. The English rule as to her separate estate, even before the Married Women's Property Act, was that the disability was removed; and undoubtedly thereafter. *In re Lady Hastings*, 35 Chan. Div. 94; *Lowe v. Fox*, 15 Q. B. Div. 667. Such is the New York rule. *Clark v. Gibbons*, 83 N. Y. 107. Contra, Miss., Ohio, North Carolina, and Texas. The reason of the disability, it is conceived, ceases when the *feme covert* is allowed to act as a *feme sole*.

**NEGLIGENCE—DEFECTIVE CONSTRUCTION—OWNER'S LIABILITY—BURKE v. IRELAND**, 62 N. Y. Supp. 453.—Where the defendant hired an architect to draw plans for a building which were inherently defective, *held*, he cannot evade the liability for injury to a contractor's employe caused by its collapse, as the duty of securing a solid foundation for the building rested on the defendant, though the contractor was negligent in laying the foundation. *Vogel v. Mayor*, 92 N. Y. 10.

Goodrich, P. J., dissented on the ground that the failure of an architect to prepare sufficient plans cannot be imputed to his principal, unless the relation of master and servant or principal and agent exists. *Berg v. Parsons*, 156 N. Y. 109.

**PATENTS—ANTICIPATION—PRIOR KNOWLEDGE AND USE.—WELSBACH LIGHT CO. v. AMERICAN INCANDESCENT LAMP CO. ET AL.**, 98 Fed. 613. *Held*, one applying for a patent in the U. S. for an invention previously made by him



and patented in a foreign country, may show actual date of his application in such country to prove the actual date of the invention, so as to avoid an alleged use in this country by an infringer before the date of the foreign patent.

This decision is in conformity with that of Judge Townsend in *Hanifen v. Price*, 96 Fed. 435, and that of Judge Dallas in *Hanifen v. Godshalk*, 78 Fed. 811. In *Hanifen v. Price*, this point was considered as new and the present case is the first affirmation we have seen of the principles in that case. See 9 YALE LAW JOURNAL 101.

**SALES—CONTRACT—INSURANCE—OPTION TO RESELL—TITLE.—***STOWELL ET AL. v. CLARK ET AL.*, 62 N. Y. Sup. 155.—Action on a policy of insurance, conditioned to be void if the interest of the insured in the property was other than sole and unconditional. Plaintiffs had purchased the machinery covered by such policy, with an option after a certain time to return it, and receive back the money paid or to pay the balance and keep it. *Held*, that plaintiffs were entitled to collect the insurance on the property destroyed, as under the contract they took an absolute title.

A purchase with right of return passes title and risk immediately to the vendee, and leaves the vendor obliged to rebuy at the vendee's option; this is the prevailing American rule. *Martin v. Adams*, 104 Mass. 262; *McKinney v. Bradlee*, 117 Mass. 321. But some cases hold that such a conditional sale is only a bailment till the time limit has expired. This is the English rule and conflicts with American rule generally. *Elphick v. Barnes*, 5 C. P. D. 321; *Carter v. Wallace*, 35 Hunn (N. Y.) 189.

**SALE OF HORSE—WARRANTY—BREACH—DAMAGES—***BRUCE v. FISS, DOERR & CARROLL HORSE CO.*, 62 N. Y. Supp. 96.—A horse was bought under a false warranty that he was a good carriage horse. *Held*, that the purchaser can recover damages for an injury caused by an attempt to use it for that particular purpose. *Randall v. Newson*, 2 Q. B. Div. 102; *Jones v. George*, 61 Tex. 345.

Contrary to this well established rule, *Schurmeier v. English*, 46 Minn. 306, held that the purchaser of a warranted wagon could not recover for damages done to a horse drawing it.

**SET-OFF—CLAIMS PURCHASED BY DEFENDANT AFTER SUIT BROUGHT—***WELLS v. OVERBY*, 54 S. W. 955 (Ky.).—*Held*, that claims against plaintiff purchased after suit brought are a proper subject of set-off.

This decision is contrary to the great weight of authority, the general rule being that a claim is not a proper subject of set-off unless it existed in favor of the defendant at the time action is brought. 22 *Am. Eng. Enc. of Law* 274.

**SHIPPING—DAMAGES TO CARGO—SEAWORTHINESS—***FARR & BAILEY MFG. CO. v. INTERNATIONAL NAV. CO.*, 98 Fed. 636.—A ship started on a voyage with one porthole insecurely fastened, which became open so that water entered and damaged cargo. *Held*, she was unseaworthy, because not in a fit condition. Gray, J., dissents.

This case was distinguished from *The Silvia*, 171 U. S. 462, where the iron ports being left open purposely to admit light, the glass ports were broken and damage done by water entering. Damage was here held to be due to fault in management, from which the owners of a ship are exempt, by the Harter Act, exempting the owners from any damage resulting from any fault or error in the navigation or in the management of the vessel.

This seems a very close distinction and one not entirely warranted by the authorities. We are inclined to follow the view of Judge Gray, who, in his dissenting opinion, cites the case of *Hedley v. Steamship Co.* 1894, *App. Cases*

222, and upholds the case of *The Silvia*. It would certainly seem to be stretching the meaning of unseaworthiness to say that a vessel is unseaworthy because of a porthole insecurely fastened.

**STREET RAILWAY—CONTRIBUTORY NEGLIGENCE—APPORTIONMENT OF FAULT**—*ANDERSON v. METROPOLITAN CO.*, 61 N. Y., Sup. 899.—Plaintiff, while riding on a wagon that was approaching at right angles a street railway, saw a car approaching about thirty feet distant. The driver did not stop or alter his course and the wagon was struck by the car. *Held*, plaintiff could not recover damages, as he was not free from fault.

The present case is distinguishable from the rule laid down in *Gilbert v. Erie R. Co.*, 97 Fed. 747, 9 YALE LAW JOURNAL 234, that where plaintiff and defendant are concurrently negligent the defendant is liable if the exercise of reasonable care on his part would have avoided plaintiff's injury. To have this rule, which seems to be well established in the United States courts, apply, gross negligence on the part of defendant is contemplated and only slight negligence on the part of the plaintiff, a state of facts which does not exist in the present case. Here the negligence seems to be not only concurrent, but of equal degree.

**STREET RAILWAYS—PECULIAR OPERATION—NEGLIGENCE PER SE—CITIZENS' ST. RY. CO. v. HOFFBAUER**, 56 A. E. 54 (Ind.).—Defendant operated an open electric car, entered from one side by a foot-board running the length of the car. The car at a certain point was run on the left instead of on the right hand double track, with the foot-board but a few inches from the trolley poles. At dusk a passenger, ignorant of the peculiar manner of operation, was injured by stepping on the foot-board and being hit by a trolley pole. *Held*, the facts are sufficient to justify a finding of negligence, but not to constitute a case of negligence per se.

The general tendency of modern decisions is to limit the province of the jury by the extension of the per se doctrine in cases where negligence is clear. *Beach Contr. Neg.* 3rd Ed., § 453. The ruling in the present case is contrary to this tendency, as many much more doubtful cases have been held within the per se rule. *French v. R. R. Co.*, 116 Mass. 537; *Daniels v. Liebig Co.*, 42 Atl. 447. Riding on a foot-board is held not negligence on part of plaintiff in *Brainard v. R. R. Co.*, 61 N. Y. Sup. 74, 9 YALE LAW JOURNAL 182.

**SURVIVAL ACTS—INSTANTANEOUS DEATH—AMOUNT OF DAMAGES—BROUGHEL v. SOUTHERN NEW ENGLAND TELEPHONE COMPANY**, 45 Atl. Rep. 435 (Conn.).—Under a statute providing that a decedent's cause of action, even in case of instantaneous death, shall survive to his administrator; the damages to be awarded are not confined to nominal damages, even though as a matter of fact, "death was instantaneous and the decedent suffered no pain or sensation, and never regained consciousness. See Comment.

**TREATIES—ENABLING STATUTES—RIGHTS OF ALIENS—BLYTHE v. HINCKLEY**, 59 Pac. Rep. 787 (Cal.).—This presented the novel question, whether a statute giving non-resident aliens the right to hold land was unconstitutional as a usurpation of the treaty-making power, when the treaty was silent upon this point. *Held*, in absence of a contrary treaty stipulation, statute was valid, *Hanreck v. Patrick*, 119 U. S. 156; and in case of conflict was not void, but merely suspended during the operation of the treaty. *Geofry v. Riggs*, 133 U. S. 258.

**VERDICT—NEW TRIAL—MALPRACTICE—EVIDENCE—PHOTOGRAPHS—EXCEPTIONS—JAMESON v. WELD**, 45 Atlan. 299 (Me.).—Action on the case against the defendant, a physician and surgeon, for malpractice in treating the plaintiff

for an injury to the elbow of the right arm. An X-ray photograph was admitted in evidence, and exception taken by counsel for defendant on the ground that it was an exaggeration and a distortion. *Held*, that it was a discretion of the presiding justice to admit an X-ray photograph, and his determination thereon is not open to exceptions.

This seems to be the rule in Mass. *Blair v. Pelham*, 118 Mass. 420; *Van Houten v. Morse*, 162 Mass. 414. In *Uddersook v. Com.*, 76 Pa. St. 340, it was held that the court may take judicial cognizance of a photograph as of other matters of science. Some authorities are more reserved. In *Cunningham, Adm.*, v. *Fair Haven & Westville R. R. Co.*, 72 Conn. 244, the court said, "We do not see how this preliminary question differs from any other, where questions of fact and law may be intermingled—the conclusions of the trial judge may be so clearly against law that we can to a certain extent review them." *Geer v. Missouri L. & M. Co.*, 134 Mo. 85; *McLean v. Scribbs*, 52 Mich. 219.

WILLS—EVIDENCE OF EXISTENCE—IN RE CAMERON'S ESTATE, 62 N. Y. Sup. 187.—*Held*, that photographs of a lost will and codicil are admissible in evidence to prove its existence and defeat proceedings to obtain letters of administration.

Photographs of places are frequently given to juries, where the jury cannot view the places. But such photographs are subject to attack as being inaccurate. *Dyson v. N. Y. and New England R. R.*, 57 Conn. 7; *Cunningham v. Fair Haven and Westville*, 72 Conn., 244. Photographs of documents, if properly authenticated, are sometimes admitted where better evidence cannot be obtained. *In re Stephens*, L. R. 9 C. P. 187.

# YALE LAW JOURNAL

---

Vol. IX.

MAY, 1900.

No. 7

---

## A FOREIGN SOVEREIGN IN AN AMERICAN COURT ; A NOVEL CASE IN INTERNATIONAL PRACTICE.

A suit was instituted in July, 1899, in the Supreme Court of the State of New York by a citizen of that State against the Republic of Mexico, which has raised some novel questions in international law and practice. The plaintiff's suit was based upon an alleged debt of \$3,075,000, with interest at seven per cent from September 1, 1865, represented by certain bonds said to have been issued by the Republic of Mexico. Upon the filing of the necessary papers, service was sought to be made upon the President of the Republic in the City of Mexico, and a warrant of attachment was served upon J. P. Morgan & Co., bankers, in the City of New York, as the alleged holders of funds belonging to the defendant.

The Mexican Ambassador in Washington, under instructions from his Government, sent an official note to the Secretary of State, setting forth that the proceedings of the Supreme Court of New York were unauthorized, null, and an offense against the independence and sovereignty of the Republic of Mexico ; in the name of his Government he protested against the proceedings and all the effects resulting therefrom ; and asked that the Executive of the United States would take such measures as to it should seem fit for the annulment and revocation of the decrees of the Court and to cause it to renounce its claim of jurisdiction over the Mexican Government.

It appeared that no precedent existed in the Department of State indicating the course of action, if any, which the Executive branch of the Government should take under the circum-

stances, but a copy of the note of the Ambassador was sent by the Secretary of State to the Attorney General for his information and such action as he might deem proper. Attorney General Griggs at once recognized the principle of international law, that a sovereign state cannot be sued in a foreign jurisdiction. He regarded it as competent for the Mexican Government to appear by counsel for the sole purpose of directing the attention of the Court to its want of jurisdiction, without prejudice; but he further held that in such a plain case as the present, Mexico should not be expected to take a step which might be regarded as inconsistent with her dignity and independence, and that, under the comity of nations, the Executive department of the Government, which is charged with conducting intercourse with foreign countries, should itself appear in Court and bring about the dismissal of the proceedings.

In accordance, therefore, with the instructions of the Attorney General, Hon. Henry L. Burnett, U. S. Attorney for the Southern District of New York, appeared before the Supreme Court of New York in the City of New York, on October 9, 1899, and filed a motion to dismiss the complaint and vacate the attachment. His right to appear under instructions from the Attorney General for the purpose of the motion, as *amicus curiae*, and not appearing for the defendant, was contested by the plaintiff's attorney, but recognized by the Court for reasons set forth in the opinion of the Justice hereafter given. The District Attorney supported his motion by an able brief with citation of numerous authorities, some of which appear in the opinion of the Court. The leading American case is that of the schooner *Exchange v. McFadden*, 7 Cranch 716, decided by Chief Justice Marshall; and that of the British Courts, the *Parlement Belge*, English Law Reports, 5 Probate Division 197. After oral argument by the District Attorney and by the plaintiff's attorney, the opinion of the Court was given, November 13, 1899, as follows:

"JOHN G. HASSARD	}
v.	
UNITED STATES OF MEXICO ET AL.	

*Bookstaver, J.*

This motion is made by the United States Attorney for the Southern District of New York, under instructions from the Attorney General of the United States, to vacate an attachment obtained by the plaintiff against the defendants and to dismiss the complaint upon the ground that this Court has no jurisdic-

tion of the subject matter. The action is against the Republic of Mexico and States of Tamaulipas and San Luis Potosi, the latter two being subordinate divisions of the former. The amount claimed is \$3,075,000, with interest at seven per cent from September 1, 1865, which is alleged to be the sum due upon 3,075 bonds of the amount of \$1,000 each, issued by the defendants on or about July 4, 1865.

The United States Attorney disclaims appearing by any authority from the defendants, but only on instructions from the Attorney General and as *amicus curiae* to call the attention of the Court to its want of jurisdiction in the premises.

That the Court is without jurisdiction seems to be a proposition beyond serious dispute. The principal defendant is an independent sovereign nation having treaty relations with this country, and the other defendants are subordinate divisions thereof.

It is an axiom of international law, of long established and general recognition, that a sovereign state cannot be sued in its own courts or in any other, without its consent and permission. For applications of this doctrine see *The Exchange v. McFadden et al.*, 7 Cranch 716; *Manning v. State of Nicaragua*, 14 How. Practice 517; *Beers v. State of Arkansas*, 20 How. 527.

This principle extends so far that a sovereign state by coming into court as a suitor does not thereby abandon its sovereignty and subjects itself to an affirmative counterclaim. *People v. Dennison*, 84 N. Y. 272; *United States v. Eckford*, 6 Wall 490.

So far as this doctrine is applied to foreign powers, it is obviously based upon sound considerations of international comity and peace; and it is significant that this country is so solicitous on this point that it has, by its Constitution, Article 3, Section 3, subdivision 2, conferred upon its highest judicial tribunal, original jurisdiction in all cases affecting ambassadors or other public ministers and consuls, and by section 667 of the United States Revised Statutes that jurisdiction is made exclusive and is extended even to domestics or domestic servants of such foreign representatives. That state courts scrupulously recognize their own lack of jurisdiction is illustrated in *Valerino v. Thompson*, 7 N. Y. 576, where it was held that the exemption was a privilege not of the representative, but of his sovereign, and that he could not waive it. It was also stated that the court will put a stop to the proceedings at any stage on its being shown that they have no jurisdiction.

So far as jurisdiction is concerned, there is no difference between suits against a sovereign directly and suits against its property. *Stanley v. Schwalby*, 147 U. S. 508; *United States v. Lee*, 106 Ib. 196.

The plaintiff's attorney strenuously combats the right of the District Attorney to intervene and points out that Section 682 of the Code provides expressly the only methods by which a motion to vacate an attachment can be made, and that the District Attorney has no standing under these provisions. The fault of this argument lies in the fact that Section 682 makes no provision for vacating an attachment of this kind, because the legislators never contemplated the issuance of such an attachment. Properly speaking, this is not a proceeding to vacate a thing that ever had validity, but rather to revoke what was the result of an inadvertence in an *ex parte* proceeding and a nullity *ab initio*, and to set the Court right on its own records and in the eyes of the world. The motion should be granted."

The case was appealed by the plaintiff to the Supreme Court of New York in full bench, and after argument by plaintiff's attorney and the District Attorney, on the 21st of December, 1899, the order of November 13th, dismissing the complaint and vacating the warrant of attachment, was affirmed with costs. A similar suit by another plaintiff was likewise dismissed for the same reasons.

The novel features of the foregoing case were: first, suit was brought against a Sovereign Government, directly, not by a proceeding *in rem* as in the leading cases cited, and notice was sought to be had by service on the foreign government; second, it is the first instance where the intervention of the Federal Executive was invoked and granted, under the comity of nations; and, third, the right of the Attorney General to appear as *amicus curiae* was recognized by the Court. The Foreign Diplomatic Representatives in Washington will recognize in this prompt action of the Attorney General a fresh evidence of the desire of the Executive of the United States to protect their Governments from annoyance through the inconsiderate or ignorant action of state courts.

JOHN W. FOSTER.

## THE UNITED STATES BANKRUPTCY LAW OF 1898.

The special objects kept in view by the framers of this law seem to have been:

1. To reduce the fees and expenses to a minimum, and to give to the creditors the control of the settlement of estates, and thereby to provide that the assets of the bankrupt shall go to his creditors rather than to officers and lawyers.

2. To provide that all bankrupts and impecunious persons, whether they have assets or not, shall obtain a discharge from their debts at a nominal expense, and thereby make it unnecessary for any man in the United States to be longer hampered by a load of debt which he is unable to pay.

3. To enforce the acceptance of compositions, and thereby put it out of the power of a few creditors to prevent the acceptance of terms of settlement offered by an insolvent, when manifestly better for the whole mass of creditors than a legal settlement of his affairs.

The law requires a deposit of \$25 upon filing a petition in voluntary bankruptcy, \$10 of which goes to the clerk of court, \$10 to the referee, and \$5 to the trustee. There is a further provision that the bankrupt may be excused from paying the \$25 upon making affidavit that he is not able to pay it. A host of such petitions have been filed in some of the States, and especially in the Southern States. Most of the District Courts in this part of the United States have established a rule that the bankrupt making the affidavit that he is unable to pay the fees, shall be subjected to an examination as to his ability to pay them.

Under this rule, it has been held *In re Collier*, 1 N. B. R. 182, that where a petitioner was earning \$30 a month, this was conclusive evidence of his ability to obtain his \$25 for the filing fees, notwithstanding that he had a family to support out of his earnings. Other similar rulings have been made, and there are likely to be in the future very few pauper petitions.

The other fees allowed, in addition to actual expenses, are:

To the referee, one per cent upon dividends paid.

To the trustee, three per cent upon the first \$5,000, two per cent upon the second \$5,000, and one per cent upon the remainder of dividends paid.



To the appraisers, attorneys, receivers, and marshals, a reasonable sum to be fixed by the court.

For taking and transcribing testimony and for copies, ten cents per hundred words.

Appraisers in this district are ordinarily allowed five dollars per day.

Marshals and sheriff's keepers in charge of property are allowed \$2.50 for twenty-four hours actual time spent in custody of property.

Attorneys for bankrupt in voluntary cases are generally allowed from twenty-five to fifty dollars, and attorneys for creditors in involuntary cases, from fifty to one hundred dollars. These amounts vary in special cases, and where the estates are large (as is seldom the case) are considerably greater.

Most of the District Courts have also established rules prescribing allowances for referees for office and clerical expenses. These rules ordinarily provide that the referees may charge \$5 for sending out notices of first meeting, correspondence and other services before first meeting, together with ten cents additional for each creditor above twenty. They also allow \$2.50 for the office expenses of the first meeting. The advertising for a meeting costs about \$2.50. The allowances to referees for expense on discharges are usually the same as those for the first meeting, and these have to be paid by the bankrupt before obtaining his discharge, whether he has made the affidavit of inability to obtain money for the filing fee or not. In cases where there are no assets no trustee is appointed, so that \$5 of the filing fee comes back to the bankrupt.

The duties of the referee, aside from sending notices, which is done by his clerks and paid for by the bankrupt or out of the estate, are numerous, or rather innumerable.

He must advise attorneys as to making their petitions and schedules, for it is less trouble to do this than to get them amended afterward. He must examine all petitions and schedules, and where they are defective it is easier for him to draw the amendments himself than to show someone else how to do it. The statute and rules allow the whole responsibility of the care and conduct of the settlement of the estate to be placed upon him, and the judges have universally availed themselves of the opportunity.

He must perform all the duties of Commissioners in State Insolvent Courts, including receiving and caring for claims, passing upon them, and hearing and deciding contests. He must draw findings of fact after hearing the case in all contests

upon petition for discharge and report them to the judge, with his recommendation, and these reports are expected to contain opinions on any matters of law involved. He must countersign every check by the trustee, which includes examining and approving the payment made by it. He must preside at all meetings and decide all questions raised. He must keep creditors advised of the condition of estates and answer all inquiries, whether made by correspondence or otherwise, and he must daily, hourly and continually be ready to answer any conceivable question of law or fact as to the scope of the bankrupt act, or the estates in his charge, made by attorneys, creditors, trustees, appraisers, bankrupts or the public. He may not be legally obliged to do all this, but he will be considered discourteous if he does not, and will find it on the whole less vexatious to do it than to refuse.

The commissions of the referee and trustee are computed not only upon the dividends, but upon the amount of both fees and dividends; thus if, after payment of all expenses, there remains \$1,000, the referee gets a commission of \$10, and the trustee of \$30, and the \$960 is divided among the creditors.

By this mode of compensation, it is made for the interest of both referee and trustee to keep down the expenses to the smallest figure possible, as the smaller the expenses, the greater the dividend and the larger the fee.

In actual practice, the amount of assets in most bankruptcy cases is so small that any small differences in expense makes little difference in the commissions, and the incentive to endeavor to reduce outlay is scarcely perceptible.

Thus far, 105 cases have been brought before me, of which 62 have been finished and 43 are still pending. Of the 105 cases, 51 have had no assets whatever; of the 62 cases finished, only 21 had assets; in only one of them was the whole estate consumed in expenses, the amount of the estate being \$42.50; of the remainder, only one of them produced dividends exceeding \$1,000, the total amount of actual net assets above mortgages in the others ranging from \$96.91 to \$1,216.60. In most of the estates, the nominal amount of assets was much larger, as there was much property subject to mortgage; but, in such cases, the actual amount realized by the trustee from the assets subject to mortgages was very small.

Generally speaking, the expense of settling an estate, exclusive of rent of store where goods are situated, has been in the neighborhood of \$75 to \$100, including expenses of trustee and referee with incidental expenses. This does not include the

four per cent. commissions. In a few cases, expenses of litigation, or expenses of storage of goods until disposed of, has carried the amount above this figure. The small amounts allowed for the fees of referees and trustees have undoubtedly had their effect in allowances for other expenses; and attorneys' fees and appraisers' fees, usually a large part of the expense of settling estates, and other expenses, have been kept to a minimum by referees and judges of District Courts.

The principle object of the law appears to be to make discharges easy, inexpensive and certain. About one-half of the cases are of bankrupts who have no assets whatever subject to execution. Most of these have heretofore made assignments in the State courts.

The total expenses, exclusive of attorney fee, for obtaining a discharge in Connecticut, and probably in most of the districts, is about \$40.

The charge of attorneys varies greatly; but, generally speaking, a man who can raise \$75 to \$100 can get a discharge from his debts and begin the world anew.

No assent of creditors and no payment of any dividend is required for a discharge.

Preferences formerly made are not obstacles to a discharge; for instance, in one case before me, a bankrupt was doing business in New York, and suddenly, without any apparent reason, he made a chattel mortgage to his mother of all his goods, who forthwith advertised them and sold them at auction for a small part of their value to his brother. The debtor then collected his outstanding accounts, paid his family and confidential clerks in full, and made an offer to his creditors of fifteen per cent. Some accepted it and some did not. The case was manifestly a very outrageous one, and the law permitting his discharge seemed in that case very unjust.

The statute, however, provides: "The judge shall discharge the applicant unless he has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed or failed to keep books of account or records from which his true financial condition might be ascertained."

The only offenses punishable under the Act, which can be committed by a bankrupt, are: "concealing property from his trustee or making a false oath in the proceeding." The fact that a bankrupt had given away his property years before is no ground for refusing a discharge under the statute, and the

making of false entries in order to furnish ground for refusing a discharge, must have been done since the passage of the Act, and, as has been held, with special reference not merely to insolvency, but to taking advantage of the Bankruptcy Act.

Neither the referee or the judge, in the case referred to, could find any warrant in the Act for refusing the discharge.

It seems also to be the law that a man finding himself to be insolvent may turn his property into cash, take a trip to Europe, and enjoy himself as much as he pleases until he has spent his last dollar, then return home, and within sixty days be freed from all his indebtedness.

While this identical case has not come to hand, so far as I am informed, any referee can cite plenty of instances of that general character.

A favorite mode of accounting for the absence of assets, which it is proved the bankrupt had shortly before his adjudication, is to testify that the money has been spent in gambling; and so frequently has this been done that the Executive Committee of the National Association of Referees in Bankruptcy have recommended an amendment to the law forbidding a discharge where the disappearance of assets thus accounted for has materially contributed to the bankruptcy.

In a case now pending before the judge of this district, the referee has declined to consider the uncorroborated testimony of the bankrupt that his funds have thus been dissipated as sufficient to overcome the presumption that they are still in his hands, arising from proof that he had them a few month before the filing of the petition, and has recommended the refusal of the discharge on the ground that under this state of proof it should be found that the bankrupt is concealing assets.

The appeal of the bankrupt from the decision of the referee has not yet been decided, and the final outcome will undoubtedly awaken considerable interest among the referees and the legal profession as well as with those intending bankruptcy.

Another additional reason recommended by the referees for refusing a discharge is: the obtaining credit by a false statement in writing, whether made for the purpose of obtaining credit from the person to whom it is made, or for the purpose of being communicated to the trade.

If this recommendation is adopted, it will tend to make business men more cautious as to representations to commercial agencies. In several cases before me the creditors have proved representations to commercial agencies widely varying from the facts, as to assets and liabilities, appearing in the schedules

of the bankrupt, the return of the appraisers, and the reports of the trustees.

It seems reasonable that one who has made written false statements to commercial agencies for the purpose of enabling him to obtain credit should not be discharged from the debts which he has thus been enabled to contract.

In the case of an oral statement, there is always more or less doubt as to the representation made, and it would cause much conflict of testimony and consume much time of referees and courts, with no certainty of a correct result, if such statements were made grounds for denying the discharge.

Another very proper amendment suggested by the referees is the making a fraudulent preference a reason for refusing a discharge, unless such preference has been surrendered within ten days after demand by receiver or trustee, or making a fraudulent transfer to any person.

The matter of having failed to keep books of account has been practically of no avail in preventing a discharge, because it is incumbent upon the objector to prove that such failure was made with the fraudulent intent of concealing the bankrupt's financial condition and in contemplation of bankruptcy, which has been held to mean that the bankrupt, at the time of failing to keep books of account, intended a voluntary assignment in United States Bankruptcy.

It is proposed to amend the Act by erasing the element of fraudulent intent, and providing that the destruction, concealment, or failure to keep, books of account, since the passage of the Act, from which the bankrupt's financial condition might be ascertained, and with intent to conceal such condition, should be ground for refusing a discharge.

Obligations not affected by a discharge are .

1. Taxes.
2. "Judgments in actions for fraud, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another."
3. Debts not properly scheduled when the creditor is ignorant of the bankruptcy.
4. Debts contracted by fraud, embezzlement, misappropriation of funds, or defalcation by one acting as an officer or in a fiduciary capacity.

The question has been raised whether liabilities for fraud, false pretenses, or wilful injuries, where judgments have not been obtained before the filing of the petition, are released by a discharge in bankruptcy.

It seems to be the general opinion that this is not the case, and that the language used is intended to exclude the operation of a discharge where the liability for fraud, etc., had been merged in the judgment before the filing of the petition.

To make this matter clear, however, it is proposed to have the Act amended so that no liabilities for frauds, etc., can be affected by a discharge in bankruptcy.

When the proposed amendments are adopted, the provisions for a discharge will not be too liberal, and the Act will be undoubtedly be beneficial in its effects. At present, a discharge from debts is certainly made easy.

The third object of the law, the enforcing of the acceptance of compositions in proper cases, is certainly a commendable one.

In almost all cases of an insolvent attempting to compromise with his creditors, there are found a few creditors who will wait until the last and refuse to sign the compromise, trusting thereby to obtain the whole or a larger share of their debt, although a settlement in the courts would certainly produce a smaller dividend for the creditors generally.

The bankrupt act provides for enforcing a composition whenever a majority in number of the creditors, having also a majority in amount of claims, accept it in writing, and the court is satisfied that it is for the best interests of the creditors, that there would be no bar to the discharge of the bankrupt if a discharge were applied for, that the offer and its acceptance are in good faith, and that the assignment of creditors has not been procured by any improper means.

The requirement of a majority in number prevents the approval by a preponderance of family creditors or special friends.

The requirement of an approval by the judge gives full opportunity for presenting any objections peculiar to special cases.

One frequent source of injustice in the application of the bankruptcy law is the provision that taxes shall in all cases be paid by the trustee.

Under this section it has been repeatedly been ruled that in estates where the bankrupt has a homestead exemption, taxes on the homestead shall be paid by the trustee out of the general assets. Usually the assets consist of goods in stock on account of which the claims of the general creditors were contracted, and to use the proceeds of these goods to pay taxes on the bankrupt's exempt real estate, seems to be as clear a case of judicial robbery as can well be imagined.

The referees have proposed an amendment to remove this evil. In this district, however, the principle is now established, upon the ground of general equity and of the provisions in the statute against paying secured creditors out of the general fund, that where the taxes due from the bankrupt are secured by liens upon property which does not benefit the estate, they need not be paid by the assets of the estate.

In one case pending before me, the bankrupt had, some years before, and while solvent, given a piece of real estate, subject to tax liens, to his wife. The tax collector presented the tax for payment against the estate. The referee held that the collector should rely upon his security, and disallowed the claim, and directed the trustee not to pay it. All the parties acquiesced.

Another case has recently arisen in which real estate mortgaged for more than its value was subject to tax liens for many years, so that the taxes, if paid, would absorb substantially all the available assets.

The referee held that the provisions of the statute as to secured claims, and the general rules of equity as to the marshalling of assets, should prevail in respect to taxes. To pay these taxes would not benefit the collector, nor the municipalities levying the taxes. It would simply result in taking the assets of the estate from the general creditors and transferring them to the secured creditors. The referee disallowed the claim and ordered the trustee not to pay the taxes. The mortgagee appealed, and the judge of this district has affirmed the decision of the referee.

The case was *In re Robert Veitch & Son*, not yet reported.

Perhaps a convenient mode of reviewing the general scope of the bankrupt law would be to consider the recommendations of the National Association of Referees in Bankruptcy for its amendment.

The report of their executive committee was rendered in March. There had previously been a general convention of referees, and a very thorough discussion of the different features of the law. The referees recommended, among other things, an increase in the number of reasons for refusing a discharge, and in the list of debts not affected by a discharge, an increase in the compensation of the trustees, that corporations be allowed to file voluntary petitions in bankruptcy, the shortening of the time within which the proceedings for an adjudication in voluntary bankruptcy may be brought to a close; the requiring the wife of a bankrupt to testify in regard to his affairs; that exempt property shall not be considered in determining the question of solvency of the respondent in a bankruptcy proceed-

ing; that taxes which are a lien on a homestead claimed to be exempt shall be paid by the trustee; that petitions for discharge shall not be filed until two months after the adjudication; that liability for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, shall not be affected by a discharge; that the appointment of a receiver or trustee of a corporation on the ground of insolvency shall be an act of bankruptcy; that the bankrupt's wife may be compelled to appear and testify.

These amendments will all be improvements in the law, and when they are passed, and the questions of jurisdiction between the United States Courts and the State Courts clearly settled, the benefits of the act will be greatly increased.

The proceeding in a case of voluntary bankruptcy is briefly as follows: The attorney for the bankrupt obtains three sets of blanks for the petition and schedules, of which the price is about one dollar. These blanks are very voluminous, but perhaps necessary. They are filed with the clerk of court. The clerk sends two of them to the referee in the county in which the bankrupt resides. The referee sends notice to the creditors of the time of first meeting. If the bankrupt has been through the probate court and has no assets, the referee in this district stamps his notices, "schedules show no assets;" no one appears at the meeting; the referee orders that no trustee be appointed; thirty days after adjudication the attorney for the bankrupt files with the court his petition for discharge; the referee sends notice of time and place of appearance to oppose the discharge. In some districts notice by creditors of the appearance to oppose is filed with the clerk of court, and, in some, with the referee; in this district, with the referee. The bankrupt is present at the time of hearing to be examined. If, after examination, any creditor desires to oppose, he files specifications of his reasons; the bankrupt files answer to this, and the referee hears the evidence and reports the facts to the judge with recommendation. If either party is dissatisfied with the finding of fact, he can have the evidence on that point certified up with the report; or, if either party thinks the recommendation is not warranted by the facts, he can have the issues of law reviewed by the judge, and the judge, in the end, decides the question of the discharge.

If there are assets, the creditors at the first meeting appoint a trustee, provided a majority in number and value agree, otherwise, the trustee is appointed by the referee. An appointment by the creditors is subject to approval by the referee, and if he finds a



reasonable ground for objection, he can refuse to approve it. Appeal can be had from his decision to the judge. but in fact such appeals are seldom made.

Dividends are supposed to be declared as often as there is five per cent. on hand. Ordinarily but one dividend is declared, and that at the final meeting.

Sales are at auction unless otherwise ordered by the referee. Orders for private sale may be made after a ten days' notice to creditors, and hearing thereon. Perishable property may be ordered by the referee to be sold without notice. This provision of the law has been very liberally construed, and it is practically held to mean that where the estate is subject to loss by keeping the property, a sale without notice will be ordered; thus *salt* has been held to be perishable.

At the final meeting, all unfinished matters are passed upon and final dividend declared. The time required for settlement runs anywhere from two months to two years. Claims for dividend may be presented at any time before declaration of the last dividend, provided that comes within a year.

Under the United States bankruptcy law, probably a much larger share of the assets go to the creditors than under assignments under State insolvency laws, because the amount absorbed by fees and expenses is very much smaller. Such laws have never been popular in this country, however, and have met with opposition from the officers who would otherwise receive fees.

The bankruptcy act has undoubtedly diminished the business of sheriffs and constables, as well as that of lawyers. Suits are not as likely to be brought when it is known that the bankrupt can obtain a discharge; and generally compromises without bankruptcy are much more easily effected.

Under the present scale of fees, no officers under the bankruptcy law are interested in retaining it, and after it has been in operation for a few years, and most of the insolvents in the country have obtained their discharge, it will doubtless be repealed, as in former cases.

HENRY G. NEWTON.

## THE PORTO RICO TARIFFS OF 1899 AND 1900.

The sole object of this paper is to consider the lawfulness of the customs duties which have been and are to be levied by the United States Executive upon goods imported into the island of Porto Rico, and upon goods imported from that island into the States of this Union.

The tariff history of Porto Rico, since the American occupation, is already divided into three periods: First, that of the military occupation up to the exchange of ratifications of the treaty of peace between the United States and Spain on April 11, 1899; during which period the island remained without doubt a foreign country within the meaning of our domestic tariff act, while the President had an equally undoubted belligerent right to levy such contributions there as he saw fit.<sup>1</sup> Second, that between the treaty of peace and the taking effect of the Temporary Porto Rico Act<sup>2</sup> on May 1, 1900; during which period the Executive treated it as a foreign country, still held only by belligerent right, continuing the system of military contributions there, and collecting full duties at our home ports, under claim of authority under the Dingley Tariff act,<sup>3</sup> upon goods imported from the island. Third, the period now commencing.

It is not my purpose to discuss the general features of the new frame of government, which, while (if constitutional) denying to the islanders American citizenship, puts them under American tutelage and breaks off their past by abolishing even their own Castilian name for their country,<sup>4</sup> forcing them for the future, in legal documents, to substitute a word of Portuguese derivation. I shall confine myself to those portions which relate to duties upon imported and exported goods. These duties, less cost of collection, are to be devoted to the local purposes of the island. They are to continue only until other provision is made by the local legislature, and in no event after March 1, 1902. Disregarding provisions of no importance for the purposes of this paper, the provisions of the

---

<sup>1</sup> *Fleming v. Page*, 9 How. 603, 614-6, and auth. cit.

<sup>2</sup> Signed April 12, 1900.

<sup>3</sup> Act of July 24, 1897 (30 Stat. 151.)

<sup>4</sup> Puerto Rico.

statute<sup>6</sup> are as follows: In general, foreign imports into Porto Rico shall pay the same duties as foreign imports into "the United States." Coffee, however, which enters our ports free of charge, is to pay a small duty; while certain other articles, dutiable here, are to be free. Commerce between Porto Rico and "the United States" is to be dutiable at fifteen per cent of the rates fixed by the Dingley Act.

The language is clear. It leaves nothing but the constitutional questions for judicial consideration, as to controversies arising in the future. It bears, indeed, upon certain controversies which have arisen in the past. It gives new legislative recognition to the obvious distinction between merchandise "coming into the United States *from Porto Rico*" and "like articles of merchandise imported *from foreign countries*." It fully recognizes the obvious fact that, as language is ordinarily used, Porto Rico is not a foreign country, but a colony or dependency of the United States, since April 11, 1899. But the Dingley Act<sup>7</sup> levies no duties except upon "articles imported from foreign countries;" and if the language now used by Congress is accurate as well as clear, then all moneys collected by the Executive upon articles coming from Porto Rico, down to the very recent time when its proceedings were ratified by Congress,<sup>8</sup> were collected without authority of law. This question is an open one, but I shall confine myself to the discussion of purely constitutional controversies.

---

" SEC. 2. That on and after the passage of this Act, the same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Porto Rico from ports other than those of the United States, which are required by law to be collected upon articles imported into the United States from foreign countries: Provided, That on all coffee in the bean or ground imported into Porto Rico, there shall be levied and collected a duty of five cents per pound, any law or part of law to the contrary notwithstanding: And provided further, That all Spanish scientific, literary, and artistic works, not subversive of public order in Porto Rico, shall be admitted free of duty into Porto Rico for a period of ten years, reckoning from the eleventh day of April, eighteen hundred and ninety-nine, as provided in said treaty of peace between the United States and Spain: And provided further, That all books and pamphlets printed in the English language shall be admitted into Porto Rico free of duty when imported from the United States. SEC. 3. That on and after the passage of this Act all merchandise coming into the United States from Porto Rico, and coming into Porto Rico from the United States, shall be entered at the several ports of entry upon payment of fifteen per centum of the duties which are required to be levied, collected, and paid upon like articles of merchandise imported from foreign countries \* \* \* ."

<sup>6</sup> Act of July 24, 1897. (30 Stat. 151).

<sup>7</sup> Act of March 24, 1900.

In entering upon this discussion, it is necessary first to examine the precedents, judicial, legislative and executive. These have been analyzed with so much thoroughness by others,<sup>8</sup> that I shall state but briefly what seems to me to be the general bearing of those which do not specially relate to tariff questions, then taking up the latter more specifically.

There is doubt even as to the precise source of the power by which we govern Porto Rico. The Constitution gives Congress the power "to make all needful rules and regulations respecting the territory or other property belonging to the United States;" and in preparing one of his famous decisions, Chief Justice Marshall was evidently first of the opinion that this clause was the source of the power to govern territories acquired by treaty. Further reflection, however, led him to question the correctness of this assumption;<sup>9</sup> and there are many reasons to believe that the clause quoted relates only to territory which the Federal government owned or claimed to own in 1789.<sup>10</sup> If it is not applicable to territory subsequently acquired, then such territory is governed not by virtue of an express power, but by virtue of a power implied from the power to acquire new territory, itself implied from the power to make war and treaties, and to admit new States. It has never been necessary for the Supreme Court to decide the question. In either case the power is subject to no specially prescribed limitations. Whatever limitations it may have, if any, are to be found elsewhere in the body of the Constitution or amendments thereto.

What limitations may restrict our power to govern newly acquired districts has been often a subject of judicial discussion; and exaggerated weight is often placed by readers of such discussion upon remarks to the effect that the power of Congress is unlimited, remarks which were not intended to convey any further idea than that Congress in their case possessed not only the Federal powers, but those also which are exercised by

---

<sup>8</sup> Besides the Congressional debates, special reference should be made to the argument of Prof. C. C. Langdell (12 *Harvard Law Rev.* 365) on the Imperialist side, and to those of Judge S. E. Baldwin (id. 393) and Mr. C. F. Randolph (33 *Congressional Record*, pp. 3791-9) opposed.

<sup>9</sup> *American Insurance Co. v. Canter*, 1 Pet. at pp. 542-3, 546.

<sup>10</sup> The fullest judicial treatment is in *Dred Scott v. Sandford*, 19 How. 393, 432-447, 500-515, 604-615, a case now discredited as to the precise point decided, but containing a large amount of very able and still valuable discussion, in the opinions of Chief Justice Taney and of Justices Campbell and Curtis. As showing the doubt belonging to this subject, see also *United States v. Gratiot*, 14 Pet. 526, 537; *National Bank v. Yankton*, 101 U. S. 129, 132.

a State within its own boundaries. Usually, the discussion has related to the applicability of those constitutional amendments which are commonly called the Bill of Rights. Certain judges have used language indicating that the inhabitants of these districts have no constitutional rights in the true sense of the word, and that whatever restrictions Congress may observe are moral, rather than constitutional, in character;<sup>11</sup> but such language has always been *obiter*, and opposed to the weight of judicial authority.<sup>12</sup> I think that we may consider it as settled, so far as anything which is disputed can be said to be settled, that those provisions of the Constitution and of the early constitutional amendments which prohibit infringement of individual rights are absolute prohibitions, unqualified by any restriction as to locality, and therefore operate as fully in the territories—that is, in the territories which we had acquired prior to 1898—as in the States. The language of the three last amendments throws no light upon the subject, for they were worded after this controversy had been long pending, and with a view of avoiding ambiguity.

Notwithstanding past authorities, however, it is contended by some that the question is still an open one. This contention is based upon the fact that every acquisition of territory prior to 1898 was accompanied by some treaty stipulation giving to the inhabitants of that territory the rights of United States citizens. It is contended that it has never been necessary for the decision of any case to consider whether newly acquired districts are protected by any self-operating provisions of the Constitution—that in every case the Constitution has been expressly extended over the district by the treaty-making power, and that this fact was sufficient to sustain the judgment of the court. To this contention the answer given is, that the Constitution is superior, not inferior, to the treaty-making power; that a treaty is but a law, which can be repealed; that if the Constitution were introduced only by force of a treaty

---

<sup>11</sup> *Benner v. Porter*, 9 How. 235, 242; *Mormon Church v. United States*, 136 U. S. 1, 44; and see also *dubitante*, *McAllister v. United States*, 141 U. S. 174, 188; *American Co. v. Fisher*, 166 U. S. 464, 468. *Endleman v. United States*, 86 Fed. Rep. 456, 459, merely quotes, without necessity, the *dicta* of the *Benner* case.

<sup>12</sup> *Murphy v. Ramsey*, 114 U. S. 15, 44, 45 and *cas. cit.*; *Ex parte Bollman*, 4 Cranch 75; *Reynolds v. United States*, 98 U. S. 145, 154; *Callan v. Wilson*, 127 U. S. 540, 550; *Thompson v. Utah*, 170 U. S. 343, 346; *Springville v. Thomas*, 166 U. S. 707; *Capital Traction Co. v. Hof*, 174 U. S. 1, 5; and see *Wong Wing v. United States*, 163 U. S. 228, 238.

provision, it might be taken away again by a subsequent statute; that if the Constitution did not exist of its own force in any given district, a law (whether in the form of treaty or statute) declaring it to exist would amount to no more than a provision that its principles should govern until the legislative or treaty-making power should otherwise enact; and that such a law would be in so far repealed if any subsequent legislation should be in conflict with it. That a treaty provision is repealed by subsequent statute, is no longer a matter of doubt.<sup>18</sup> If we promise a foreign power upon cession of territory that we will give to it, or to its citizens, or to the inhabitants of the territory, any specified right, privilege or immunity, we may break our promise, and as a general rule our courts cannot intervene. The breach of the promise would be a *casus belli*; but it would raise a political, not a judicial question. To this answer the imperialists reply, however, that some treaty provisions are self-executing, and so vest rights which cannot be taken away by subsequent legislation; that (as they claim) the provisions of our former annexation treaties are of this character; and that the judicial decisions upon the operation of the Constitution in districts thus ceded should be based upon this ground. It is undoubtedly true that a treaty, like a statute, may be so worded as to vest rights by its own inherent force, without the aid of any subsequent legislation or judicial proceedings. It may vest title to lands, so that they cannot be taken away afterwards without just compensation. It may operate as a general naturalization law, giving to the inhabitants of a ceded territory the full rights of American citizens. Whether the past judicial authorities upon the question of the application of the Bill of Rights in our territories will be absolutely controlling upon cases arising in Porto Rico, or whether each will have merely the weight due to a carefully considered judicial opinion upon a point not necessary to the decision of the case under consideration by the court, will depend upon the construction of certain treaty provisions.

Moreover, it is arguable that the absolute prohibitions upon legislative action which are contained in the Bill of Rights might be held applicable to our new possessions, without its necessarily following that the clauses in the original constitution restricting the legislative power of taxation are equally

---

<sup>18</sup> *Whitney v. Robertson*, 124 U. S. 190; *Chinese Exclusion Case* 130 U. S. 581.

applicable, especially the clause requiring certain forms of taxation to be uniform throughout the United States.

On the other hand, there are grave reasons for holding this "uniformity clause" applicable to the territories, which do not exist in the case of the other prohibitions. Such a holding may be necessary for the protection of the States, which are entitled to demand that the duties levied upon them shall be no greater than those levied in the districts immediately under the care and at the expense of the whole nation. This is no fanciful illustration. Already there are exemptions granted to Porto Rico which are not conceded to the States, while it is seriously proposed, as a means of maintaining the policy of the "open door" in the Far East, to permit entry of foreign goods into the Philippines at rates far below those charged in the ports of our States. It is admitted by most administration leaders that what can be done in the Philippines can be done in New Mexico and Arizona; and, therefore, if the uniformity clause does not apply to the commerce of the territories, Congress might encourage the trade of New Mexico and Arizona at the expense of the trade of California and Texas. The danger here may be slight; but it was the precise danger feared by the framers of the Constitution.

I will now consider the precedents bearing directly upon the right of taxation in organized or unorganized territories of the United States, taking them up—whether they be judicial, executive or legislative—in their chronological order; but without cataloguing the diverse views of individual statesmen, journalists and counsel, from time to time.

Much stress has been laid upon the fact that our first Customs Administration Acts<sup>14</sup> provided no machinery for the collection of duties upon merchandise imported into the territories; and this has been spoken of as if it were a contemporaneous practical construction of the Constitution, proving that duties were not expected to be uniform except among the States themselves. This supposition is due to imperfect knowledge of the provisions of those acts. Neither of the territories then existing bordered upon the sea; and the only port where merchandise was permitted to be imported otherwise than by sea was the port of Louisville in the State of Virginia (later of Kentucky).<sup>15</sup> This was indeed a discrimination in favor of a single

---

<sup>14</sup> Act of July 31, 1789 (1 Stat. 29); Act of August 4, 1790 (1 Stat. 145).

<sup>15</sup> 1 Stat. 48; *Id.* 177.

port, but it was a discrimination permitted by the Constitution," and hence there could not lawfully be any duties in the territories to collect.

It has also been urged that under our first excise laws no tax collectors were provided for the territories. This fact is entitled to consideration, although it is probably susceptible of explanation without affecting any constitutional argument. The first excise was a provision inserted in a tariff law, to be collected by the machinery provided for collection of certain tariff duties;" and tariff duties, as I have pointed out, were not operative in the territories because nobody could import goods there. Our early excises would very likely have given no return sufficient to warrant the establishment of any machinery for collection there; and even if the omission to provide for collection bureaus in the territories was deliberate, we should wish to know the motive before giving a constitutional interpretation to what may have been merely good fiscal management.

In 1799, when the territories had begun to be commercially important, the machinery for collection of duties was extended to include them;" and they have been included practically, as well as theoretically, in the operation of the uniformity clause ever since.

During the first decade of our constitutional history, however, we find a most striking confirmation of the theory of the applicability of this provision to the territories, in the corresponding provision concerning naturalization. Elsewhere in the Constitution Congress is empowered "to establish an uniform rule of naturalization and uniform laws on the subject of bankruptcy throughout the United States." The first naturalization law was passed by the First Congress, in 1790, and conferred its benefits upon all aliens who for the prescribed periods "shall have resided within the limits and under the jurisdiction of the United States." It, however, assumed that the alien would have resided in "one of the States," the Northwest Territory being then so sparsely populated that it was evidently overlooked." In 1795, however, a new naturalization law was passed, with a preamble stating that it was "for carrying into complete effect the power given by the Constitution to establish an uniform rule of naturalization throughout the United States." This act gave the naturalizing power to the

---

<sup>16</sup> *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421, 435.

<sup>17</sup> Act of March 3, 1791 (1 Stat. 199, 200).

<sup>18</sup> Customs Administration Act of March 2, 1799 (1 Stat. 627, 637-9).

<sup>19</sup> Act of March 26, 1790 (1 Stat. 103).



courts "of the States or of the territories Northwest or South of the River Ohio"; and provided that the applicant should have "resided within the United States five years at least, and within the State or territory where such court is at the time held, one year at least." The alien cannot be naturalized unless the court is "satisfied that he has resided within the limits and under the jurisdiction of the United States five years" and is "attached to the principles of the Constitution of the United States."<sup>20</sup> We have thus an almost contemporary construction of the meaning of these uniformity clauses; and the weight of such a construction must be almost, if not quite, conclusive.<sup>21</sup> The first bankruptcy law contains some language inapplicable to the territories, and is to be administered by judges of the district courts of the United States.<sup>22</sup> Whether this term includes the territorial courts of that time<sup>23</sup> does not seem to have been decided, and I am not informed of the practice under the act. It was very soon repealed,<sup>24</sup> so that the matter, in view of the then sparse population of the territories, is of no great weight.

New questions arose with the treaty of 1803, by which Louisiana was ceded to the Union. That treaty provided that for a period of twelve years goods imported into Louisiana in French and Spanish vessels, coming from ports of their own countries, should pay no greater rate of duties than goods imported in vessels of the United States.<sup>25</sup> The treaty provoked memorable debates in both Houses of Congress upon the constitutional questions involved. It brought up for the first time the question of our right to acquire new territory, as well as the question how the new territory could be governed. The debates were very short, however, since there was need of most immediate action. The constitutional discussion in the House of Representatives occupied a single day; and not until it was half over did Roger Griswold, a Federalist leader in Connecticut, raise the point that the special privilege to French and Spanish vessels was a violation of the uniformity clause of the Constitution, since the treaty provided that Louisiana should be part of the United States, so that the duties there paid should be uniform with those paid elsewhere.<sup>26</sup> The point received

---

<sup>20</sup> Act of January 29, 1795 (1 Stat. 414).

<sup>21</sup> *The Laura*, 114 U. S. 411, 416.

<sup>22</sup> Act of April 4, 1800 (2 Stat. 19).

<sup>23</sup> See 1 Stat. 51; 2 Stat. 90.

<sup>24</sup> Act of December 19, 1803 (2 Stat. 248).

<sup>25</sup> 8 Stat. 204.

<sup>26</sup> *Annals of Congress*, October 25, 1803, pp. 463-4.

little attention, and the treaty was approved by an overwhelming majority. In answer to another and clearly untenable constitutional objection to the same treaty provision, while some administration leaders denied that the commerce of the new territory would be subject to the Constitution, John Randolph of Virginia took the ground that this special privilege was defensible, because it was part of the price which we paid for the territory, which came to us subject to a restriction; but that if it violated the Constitution, a remedy could be found by giving the French and Spanish vessels a similar twelve years' privilege in our other ports." The last point was certainly a good one. The treaty provision was subsequently confirmed by statute; and the fact that no French or Spanish importer claimed the benefit of the Constitution in any of the ports of the older States is entitled to no practical weight, as customs cases did not find their way into our courts until long after the expiration of this period." Too great stress can easily be laid on such omissions. Even now there is a plain violation of the uniformity clause on our statute book which has stood there for nearly thirty-five years without question, so far as I am informed."

Possession of Louisiana, under this treaty, was not taken until December 20, 1803. It was announced to Congress on January 16, 1804. The act extending our customs revenue system to Louisiana was approved February 24, and went into effect thirty days later, or about three months after the new territory came actually into our control." During this period the Treasury Department seems to have ruled that imports therefrom were subject to duty." The amount of these imports must have been but small. The Secretary of the Treasury, Albert Gallatin, was not a lawyer, although a most able financier; and he was struggling with most important and intricate questions relating to the fiscal management of the new possession. His omission to raise and sustain the constitutional point is a precedent for the Imperialists, for what it may be worth.

Florida was the next addition to our possessions. The treaty of cession was ratified February 19, 1821. It contained a twelve years' privilege like that of the Louisiana treaty."

<sup>21</sup> Id., pp. 437-8, 456-7.

<sup>22</sup> The right to recover duties overpaid was not established until 1836 (*Elliott v. Swartwout*, 10 Pet. 137).

<sup>23</sup> Rev. St., Sec. 3114.

<sup>24</sup> 2 Stat. 251, 254.

<sup>25</sup> 1 Mayo 104; but see *Cross v. Harrison*, *infra*.

<sup>26</sup> 8 Stat. 262.

The temporary act extending our customs revenue system over the new territory was approved March 3, 1821." This act recognizes Florida as part of the United States, and conforms to the uniformity clause of the Constitution. Possession had not yet been taken. The question subsequently arose whether Florida became actually a part of the United States for revenue purposes when the treaty was ratified, or when possession was delivered. Attorney General Wirt in the case of *The Olive Branch*" ruled upon the latter theory, holding goods dutiable which were shipped from St. Augustine on July 14, 1821, possession not having been delivered until July 17.

In 1820, during the period between the signing and the ratification of the Florida treaty, the case of *Loughborough v. Blake*" came before the Supreme Court. It raised the question whether Congress had the right to impose a direct tax upon the District of Columbia. It was not necessary to the decision of this case to decide whether the uniformity clause of the Constitution applies to the territories and the District of Columbia. That question was, however, considered by Chief Justice Marshall, and he gave the weight of his great name to the proposition that the words "United States" in the uniformity clause include not merely the States, but the whole "of the American Empire." This was only a *dictum*, but it was a *dictum* of high authority.

<sup>23</sup> 3 Stat. 639.

<sup>24</sup> 1 A. G. Op. 483.

<sup>25</sup> 5 Wheat. 317.

<sup>26</sup> "This grant [of the taxing power] is general, without limitation as to place. It consequently extends to all places over which the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are "but all duties, imposts, and excises, shall be uniform throughout the United States." It will not be contended, that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts and excises may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the territory west of the Missouri, is not less within the United States, than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows, that the power to impose direct taxes also extends throughout the United States." (5 Wheat. at pp. 318-19.)

In March, 1845, Congress passed a joint resolution for the annexation of Texas, then an independent republic. The matter remained executory at the time of the final adjournment of Congress. The question was raised during the summer, whether goods imported from Texas were dutiable. Robert J. Walker, Secretary of the Treasury, held that they were dutiable until further action by Congress, although the resolutions had been approved by the Texan Government." The Supreme Court afterwards held that the date of the admission of Texas to the Union was December 29, 1845," thus impliedly sustaining the Secretary's decision.

California was ceded to the Union by the Treaty of Guadalupe Hidalgo, ratified May 30, 1848. It was then held in military possession. The cession was not made in express words, but impliedly by readjustment of the boundary line." Congress was in session at the time, but adjourned without providing for the extension of the customs revenue system over the newly annexed territory. It recognized the fact of annexation only by establishing mail routes and providing that two postal agents should go out to California and organize the postal system there." The question was thus squarely presented to the Executive Department for consideration, whether duties were properly leviable upon imports from newly acquired territories, as to whose revenue matters Congress had not yet legislated, into the States of the Union; and also whether, under the language of the tariff law (which so far as material was then the same as now)" the same rates of duties must be levied in California as in the States. President Polk and his Cabinet evidently examined the constitutional questions with the greatest care. They decided, and Secretary Buchanan announced to the people of California through one of the postal agents, that the government by belligerent right had ceased upon the ratification of the treaty of cession; that the former military government thereafter continued in power as a *de facto* government, until Congress should otherwise provide; that the war tariff, which had been established by that government in California, had been superseded by the general tariff law: and that no duties were leviable on goods imported from California into the

---

<sup>21</sup> 1 Mayo, 375.

<sup>22</sup> *Calkin v. Cocke*, 14 How. 227.

<sup>23</sup> 9 Stat. 926, 929.

<sup>24</sup> 9 Stat. 320.

<sup>25</sup> Levying duties on "all articles imported from foreign countries" (9 Stat. 42).

States." "This was but a decision of the Executive Department, but it was very carefully considered, and is entitled to some weight. I know of no evidence that the slavery question had anything to do with it." It is especially interesting, because there was no language in the treaty, and no legislation by Congress, which provided for the immediate extension of the Constitution over the new territory." Even the promise to give its inhabitants the rights of citizens was an executory one."

At the December term, 1849, the Supreme Court decided the famous case of *Fleming v. Page*," so much relied upon by the Imperialists. The point decided was a simple one, and the ground of decision indisputable. During the Mexican war we held the Mexican State of Tamaulipas in military occupation for a long period. During that period certain goods were imported from that State into Philadelphia, and were there claimed to be free from duty on the ground that Tamaulipas was a part of the United States. It was undoubtedly a part of the United States for many purposes in theory of international law." The court very properly held, however, that the President, as Commander-in-Chief of the armies of the United States, had no constitutional power to extend the boundaries of the country; that this could be done only by act of Congress or by treaty; and, therefore, that under our Constitution the State of Tamaulipas was still to be regarded as a foreign country. Chief Justice Taney went on, however, to make some entirely unnecessary remarks about the practice of the Treasury Department in regard to the cessions of Florida and Louisiana;

<sup>43</sup> Quoted in *Cross v. Harrison*, 16 How. at pp. 184-5.

<sup>44</sup> The peculiarity and the error of Calhoun's doctrine was not that it made the Constitution at once operate in new territory, but that it read into the Constitution a guaranty of the institution of slavery. The weakness of his opponents' position was that they went too far, and sacrificed the constitutional guaranties which did and do exist.

<sup>45</sup> It is a misapprehension to suppose that international law prevents the Constitution from operating in ceded territory until Congress legislates. International law is not law at all in any land except so far as it is a part of the municipal law of that land, and, like our statutes, it is subordinate to the Constitution, which comes into operation at once. "Every nation acquiring territory by treaty or otherwise must hold it subject to the Constitution and laws of its own government." (*Pollard's Lessee v. Hagan*, 3 How. 212, 225; *Chicago, Rock Island, etc., Ry. Co. v. McGlinn*, 114 U. S. 542, 546.)

<sup>46</sup> 9 Stat. 930.

<sup>47</sup> 9 How. 603.

<sup>48</sup> *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191; *The Foltina*, 1 Dod. 450.

remarks which, so far as applicable to the tariff question, seem plainly erroneous. He says that after the United States had taken possession of Pensacola under the Florida cession, goods imported from that port "before an act of Congress was passed erecting it into a collection district, and authorizing the appointment of a collector, were liable to duty." But, as we have seen, Congress had made these necessary provisions before the United States took possession. The Chief Justice's statement seems to be taken from Secretary Walker's Texas circular above referred to;" but the ruling therein discussed is there stated to have been made in 1819, when somebody seems to have made the untenable claim that Florida was part of the United States because the treaty had been signed, although it had not yet been ratified. The Chief Justice goes on to say that the decision which he refers to "was sanctioned at the time by the Attorney General"; but there is no such ruling to be found in the printed reports of the Attorney General's opinions. There is some ground for belief that the Chief Justice was making a mistaken reference to the case of the Olive Branch." The Chief Justice's further remarks relate to the Treasury practice in granting clearances in the coasting trade; and this is immaterial for our purposes, since the constitutional provision against preference to the ports of any State has clearly no operation in a territory.

*Cross v. Harrison* " involved the legality of the duties collected by the California *de facto* government between the date of the treaty of cession and the date when the regularly appointed collector of customs entered upon the duties of his office. It was an action brought against the *de facto* collector to recover duties paid to him under protest. The duties collected, as I have stated, were at the rates provided in the local war tariff up to the date when news of the ratification of the treaty of peace reached California, and after that time at the rates provided by the general tariff law of the United States. Mr. Justice Wayne, in the opinion of the court, recites at length the proceedings of the Polk administration in California after the treaty, quoting at length from the constitutional arguments of Secretary Buchanan to the effect that California was under a *de facto* government, succeeding the government based upon belligerent right, and that it was part of the United States within the

---

<sup>48</sup> 1 Mayo 375.

<sup>49</sup> See remark of Daniel Webster, 9 How. at p. 613.

<sup>50</sup> 16 How. 164.

meaning of the tariff clause of the Constitution. He also quotes Secretary Walker's ruling that the Treasury Department had been given no power to collect duties in California, so that their collection had to remain in charge of the War Department, which was conducting the *de facto* government. The court decided that the imposition of the regular duties, as soon as the fact of the cession of California became known, was rightful and correct; that it was perfectly proper to collect duties under the local war tariff until the fact of cession was known; that the landing of goods free of duty at any place out of a collection district "would be a violation of that provision in the Constitution which enjoins that all duties, imposts and excises shall be uniform throughout the United States"; that "the ratifications of the treaty made California a part of the United States; and that as soon as it became so, the territory became subject to the acts which were in force to regulate foreign commerce with the United States, after those had ceased which had been instituted for its regulation as a belligerent right"; and that Congress has since ratified all of the acts of the *de facto* government, including those of the Collector. Counsel for the importers claimed that it had not been the practice of the United States to collect duties in such cases until Congress had legislated, citing the Fleming case, and also relying upon the precedents of Louisiana and Florida." Mr. Justice Wayne, after discussing the latter precedents, says that "there was no interval in either instance where duties were not collected upon foreign importations, because Congress had not legislated for it to be done." "

Much of the argument in *Cross v. Harrison* was not necessary to the decision. The case might have been disposed of by saying simply that Congress had ratified everything done, and that the constitutional question was immaterial, because the voluntary action of the Executive had directed precisely what the Constitution, if applicable, would have required. But it still remains true that the deliberate decision of the Polk administration upon this constitutional question was carefully and thoroughly reviewed, and fully approved, by a unanimous decision of the Supreme Court rendered after a most elaborate argument, and in view of all the legislative and executive precedents; and rendered in the case of a still unorganized territory, which was protected by no self-operative treaty provision

---

" 16 How. at pp. 174-6.

" Id. at p. 200.

or statute. While such a decision is not absolutely controlling, it shows the weight of authority to be altogether on the side of those maintaining that the uniformity clause, at least, of the Constitution, extends *proprio vigore* over all territory ceded to the United States.

In 1868, immediately after the cession of Alaska to the United States, the principle of *Cross v. Harrison* was followed by the Treasury Department without question," and goods shipped from Alaska to our ports were therefore held entitled to admission free of duty.

The present administration has reversed the California precedent. No judicial decision upon its action has as yet been procured. The Board of General Appraisers, a *quasi* judicial tribunal in the Treasury Department, has written an opinion upon the subject, sustaining the action of the administration;" but the opinion seems to me to be based upon a misunderstanding of the historical precedents, and unless a recent well known opinion of the Supreme Court" is to be overruled in principle, the Board was altogether without jurisdiction in the premises, since the importers who brought the case before it had to concede for the purposes of the case, by so doing, that the Island of Porto Rico was a foreign country, which was the only question for decision.

In discussing the application of the uniformity clause of the Constitution to special cases which have come up from time to time, where the existence of uniformity has been challenged, justices have used expressions in opinions to the effect that the requirement of uniformity, while held by them to be geographical in character, requires only that the rate of duty should be no greater in one State than in any other State, and similar expressions have been used by constitutional writers." In the cases referred to, however, no question was raised as to the operation of these taxes in the territories; all duties, imposts and excises, on the other hand, since the beginning of our

---

"Syn. Dec. Treas. Dept. 1868, pp. 10, 20.

"Syn. Dec. Treas. Dept., Feb. 14, 1900. No. 22018.

"In re Fassett, 142 U. S. 479, 487.

"Income Tax Case, 5 D. C. App. at p. 421; 157 U. S. at p. 593; 1 Story on the Constitution, § 957. Discrimination between States was doubtless the main evil aimed at, but Mr. Justice Story, who first pointed this out, also gives his full endorsement to *Loughborough v. Blake* (§ 999), and we shall see that the framers of the Constitution felt under the fullest obligation to treat the inhabitants of the then existing territory upon an equal footing with those of the States.



government, have been laid upon States and territories alike; and the use of the expressions which I have referred to, being sufficient and entirely proper so far as the disposition of the cases then before the courts were concerned, cannot properly be regarded as having any controlling influence upon a question not before the court." "We take it to be a sound principle that no proposition of law can be said to be overruled by a court, which was not in the mind of the court when the decision was made."<sup>11</sup>

Stress has been laid by some upon the fact that there are so many clauses in statutes and treaties extending the laws of the United States to newly acquired territory, and extending the rights of United States citizens to their inhabitants. Little weight can properly be attached to such clauses. It is very proper to insert them for greater caution, and if the absence of a constitutional right, unless expressly granted by law, could be inferred from the fact that it is common to specially recognize it in drafting statutes, our constitutional system would be thrown into considerable confusion.

Thus much for the past precedents. So far as they go, their weight is against the Imperialist theory, and in favor of the position that Porto Rico upon April 11, 1899, became a part of the United States, at least enough so, to entitle it to the benefit of the uniformity clause of the Constitution. Let us now assume, however, that they will be distinguished upon the ground that they are sustainable upon special treaty provisions of those times, or upon other grounds not material to the present controversy. Let us then examine the questions raised by the Porto Rico tariffs as original questions, uncontrolled by precedents, and to be solved by an examination of the Constitution itself.

It is now often said that the Constitution does not extend to Porto Rico. This is certainly an inaccurate form of expression. Neither Congress nor the Executive has any lawful power anywhere except from the Constitution. The sovereignty of the United States resides in its people, not in its officials. When the President as Commander-in-Chief invades a foreign country, he is bound only by the limitations of civilized warfare, but that is because the people, through the Constitution, have given him a power subject only to those limitations. He

---

<sup>11</sup> *Pollock v. Farmer's Loan and Trust Co.*, 157 U. S. at pp. 574-5 and cases cited.

<sup>12</sup> *Woodruff v. Parham*, 8 Wall, 123, 133.

conducts courts in semi-civilized countries, putting criminals to death without benefit of jury; but while the Bill of Rights does not operate there, where the sovereignty belongs to a foreign ruler under whose permission the courts are organized, the President's acceptance of that permission is by authority from us, speaking through the Constitution. If the flag goes anywhere without the Constitution, it goes unaccompanied by any authority from the people of the United States.

The Constitution does extend to Porto Rico. Implied powers under the Constitution are the sole authority for our government there, and the sole authority for the taxes which we have paid to maintain that government. The problem to be solved is not whether the Constitution extends there, but which of its provisions are operative to restrict legislative and Executive action in regard to the island and its inhabitants.

The questions thus to be solved are as follows: First, whether goods imported from foreign countries into Porto Rico can be subjected to duties for the benefit of the United States Treasury, at rates different from those levied upon goods imported from foreign countries into the States of the Union; second, whether goods imported from Porto Rico into the States of the Union can be subjected to the payment of duties to be covered into the Treasury of the United States; third, whether goods imported from the States of the Union into Porto Rico can be so subjected; fourth, (if the answer to the previous questions be in the negative), whether these various duties are validated by being covered into the local treasury of Porto Rico, instead of into the general treasury of the United States.

The answer to the first question depends upon the construction of the following constitutional provision: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and the general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States." The last clause of this provision is commonly called the "uniformity clause" of the Constitution. It will be noticed that the clause is not entirely independent, but a limitation upon the taxing power. What is the meaning of "United States" in the uniformity clause? Plainly, it seems to me, the same as the meaning of "United States" in the clause preceding. Whatever variation may or may not exist in the meaning of "United States" in other portions of the Constitution, or of the amendments thereto, I think that it would be an unjust reflection upon the draftsmen of that instrument to say that

they were guilty of using it twice in this paragraph with different meanings. What, then, is the "United States," throughout which all duties, imposts and excises shall be uniform? Plainly, it seems to me, the same "United States" for whose common defence, and for whose general welfare, Congress may exercise the taxing power. If Porto Rico is not so far within the United States that duties levied there must be uniform with those levied elsewhere, then it is no part of the "United States" which Congress may tax us to defend. The word "throughout" shows that the "United States" for whose welfare taxation can be imposed, is not a mere intangible idea—a mere personification of the national sovereignty—but a geographical as well as a political fact; that it is something which can be pointed out upon a map; and I think that the map upon which it can be pointed out is what we hang upon our walls and call the map of the United States. Nor do I think that the meaning of the Constitution must now be changed, just because our boundaries have become too extended and too complicated to be conveniently shown upon a single map.

And here I may allude to what seems to me a very singular misapprehension of one of the ablest of Imperialist constitutional lawyers." If territory annexed becomes a part of the United States, he asks "where is to be found the power to dispose of it," saying that it could no more be ceded to a foreign country than one of the States could be. I answer, first, that if the territorial clause of the Constitution applies to territory acquired since 1800, then there is an express power to dispose of it; second, that in any case the power to acquire territory implies the power to dispose of it; third, that even a portion of a State can be ceded to a foreign government if the State gives its consent that the cession be made." This would not, of course, deprive the inhabitants of the ceded district of their election to retain United States citizenship.

It is an interesting fact that, while duties, imposts and excises are to be "uniform throughout the United States," direct taxes are to be "apportioned among the several States," thus not making it obligatory upon Congress to impose that class of taxes upon the territories also. This distinction was noticed by Chief Justice Marshall; and while holding that

---

<sup>10</sup> John C. Spooner in the Senate, April 2, 1900.

<sup>11</sup> See *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 541; *Geofroy v. Riggs*, 133 U. S. 258, 267, referring to the cession of a part of Maine to Great Britain in 1842, to settle a boundary dispute.

direct taxes might be levied in the territories at the option of Congress, he suggested as a reason for not having made the extension of every general direct tax to the territories obligatory upon Congress, that the cost of collection of such tax might be greater than the amount collected."

It is altogether probable that the framers of the Constitution had the territories in mind in the drafting of these sections. The Northwest Territorial Government was established by the Continental Congress by the famous Ordinance of July 13, 1787," and was known to the Constitutional Convention shortly thereafter. The Ordinance declared itself to be a "compact between the original States and the people and States in the said territory," "unalterable except by common consent; and it specially provided that the inhabitants of the territory should be subject to pay their share of the debts and expenses of the Federal Government, "to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States." "However deficient the power of the Continental Congress to enter into this compact may have been, it was regarded by all as sacred, and was promptly confirmed by the first Congress under the Constitution."

Comparison with other clauses of the Constitution tends to confirm the view that the "United States" as used in the taxing clause includes the entire territory for whose defense and welfare the Federal Government is established, whether or not that territory may be within the limits of a State. The phrase "citizen of the United States" appears frequently in the Constitution, and it has never been seriously doubted until of late that a decree of naturalization, which constitutes one a citizen of the United States, may be granted in a territory, and may thus constitute one a citizen of the United States who is not a citizen of any State." The power of naturalization is also contained in a "uniformity clause." That this uniformity must prevail throughout the territories, as well as throughout the States, I have already shown to be the settled practical construction of the Constitution.

---

<sup>11</sup> *Loughborough v. Blake*, 5 Wheat. at p. 323.

<sup>12</sup> 1 Stat. 51, note; Rev. St., ed. 1878, p. 13.

<sup>13</sup> Ordinance of 1787, § 14.

<sup>14</sup> Ordinance of 1787, Article IV.

<sup>15</sup> 1 Stat. 50.

<sup>16</sup> This was conceded in the Louisiana debate of 1803 by one of the administration leaders of the Senate, the famous John Taylor of Carolina.

Much has been made by the Imperialists of the ruling originating with Chief Justice Marshall," and since steadfastly adhered to, that the territorial courts are not organized under the judiciary article of the Constitution, so that it is not necessary that their judges should hold their offices during good behavior. The foundation of this ruling must be found, however, in the peculiar language of the judiciary article. That article does not require that all the judges of courts of the United States should hold office during good behavior. It provides that the "judicial power of the United States" should be vested in certain courts, the tenure of whose judges should be as stated. It then proceeds to define this "judicial power," and its definition excludes a very large class of cases arising in the territories—such as common law and equity cases arising there, which are not founded upon any provision of statute or treaty. Evidently, therefore, the courts established by the judiciary article are not sufficient to give the requisite protection to inhabitants of the territories or of the District of Columbia; and their protection must be found in the general and exclusive power of Congress to legislate in all their matters. The ruling of the Supreme Court upon this point has not been regarded by the majority of subsequent rulings of that court as excluding the territories from the protection of other clauses of the Constitution.

Mainly for the above reasons, I believe that the uniformity clause of the Constitution should be construed to apply to Porto Rico, as well as to Connecticut or New York; and that whatever duties are levied in New York upon goods coming from foreign ports should be equally levied in Porto Rico, and devoted to the common defence and general welfare of the whole United States, although they may of course be specially appropriated for the benefit of Porto Rico.

If, then, Porto Rico be part of the United States within the uniformity clause of the Constitution, it follows that the second and third questions must be answered in the negative, as well as the first. Duties are not uniform throughout the United States if they are levied upon commerce between the States and Porto Rico, while they are not levied upon commerce between the States and Arizona or Alaska.

Even were Porto Rico no part of the United States, an article "imported from the United States" into the island, as the sec-

---

"American Insurance Co. v. Canter, 1 Pet. 511.

ond section of the new law puts it, would not be dutiable. Its departure from our coast and arrival at the island are parts of a single commercial transaction. While it is an import there, it is an export here. By a plain and express constitutional prohibition, "no tax or duty shall be laid on articles exported from any State"; and it has been well said that "the United States cannot, by transferring the place of collection, change the character of the tax that may be levied and collected."<sup>18</sup>

Hence the article is not taxable if it is exported from any State within the meaning of the prohibition. It certainly is an export from a State in the ordinary meaning of the English language, whatever kind of a dependency Porto Rico may be; and there is no doubt that all exports to foreign countries are within the prohibition. The Executive, by ruling Porto Rico to be a "foreign country" within the meaning of the Dingley Tariff Act, hence put itself in the position of violating an express prohibition in the Constitution of the United States every time that it collected these duties in Porto Rico—a prohibition which undoubtedly applied to the case, for it was the rights of a State, not a territory, which were infringed.

If, however, Porto Rico is not a "foreign country," and if on this account the export clause is inapplicable, then it follows, under the authorities, that Congress has not received the power to tax this branch of commerce. There are no decisions in point under the clause prohibiting Congress from taxing exports, but there is authority upon the clause placing a similar prohibition upon the States. This clause came up for examination in 1860 in *Almy v. California*,<sup>19</sup> a case involving a State tax affecting articles exported from California to New York. It was objected to as a regulation of inter-State commerce and as a tax upon exports. So able a counsel as Judah P. Benjamin seems to have conceded that the articles were exported within the meaning of the Constitution, endeavoring to evade the prohibition by arguments immaterial here. The Supreme Court unanimously held them to be exports and based their decision upon that ground alone. In 1868 a similar question came up again in *Woodruff v. Parham*,<sup>20</sup> which overruled the former case upon the point decided (one justice strongly dissenting) and held that goods exported from one State to another are

---

<sup>18</sup> William Lindsay in the Senate, March 9, 1900; compare *Brown v. Maryland*, 12 Wheat. 419, 437, 440; *Woodruff v. Parham*, 8 Wall. 123, 132.

<sup>19</sup> 24 How. 169.

<sup>20</sup> 8 Wall. 123.

not exports within the constitutional prohibition. The reasoning of the court, however, is as fatal to the tax which we are considering as if it had sustained the *Almy* case. The point was, of course, urged, that if goods sent from one State to another are not "exports," then Congress has power to tax inter-State commerce to any extent. Mr. Justice Miller, however, replied that Congress has no right to tax exports of any kind except under its right to levy "imposts"; that the word "imposts," as used in the Constitution, gives no right to lay duties on inter-State commerce; that hence "we have, in the power to lay duties on imports from abroad, and the prohibition to lay such duties on exports to other countries, the power and its limitations concerning imposts." "Hence this dilemma: If Porto Rico is "abroad," to be ranked among "other countries," the tax on exports thereto is expressly forbidden. If Porto Rico is not "abroad," among "other countries," then the tax is void for lack of power.

The fourth question still remains for examination—whether Congress has remedied any of these defects by turning the proceeds of taxation into the local treasury of Porto Rico, to be expended for local purposes.

The uniformity clause of the Constitution is in form a limitation upon the clause which grants a taxing power "for the common defense, and general welfare of the United States." "Congress has an independent taxing power in the territories and District of Columbia, to be exercised for local purposes." Is the uniformity clause to be construed as a limitation upon this local power of taxation also? I do not think that this is a necessary construction. If, in addition to the uniform duties, imposts and excises, which operate throughout what Marshall called "the American Empire," Congress shall impose duties as well as direct taxes, to be collected in the territories and devoted to the necessities of their government, I do not see that the uniformity clause is violated. The main resource of our territorial treasuries has always been direct taxation; but they thrive also upon a system of license fees upon occupations, which are duties or excises," which could not be levied by

---

<sup>118</sup> 8 Wall. at p. 132.

<sup>119</sup> The debts referred to in the same sentence are the debts incurred prior to 1789, which have long since been paid.

<sup>120</sup> *Loughborough v. Blake*, 5 Wheat. 317.

<sup>121</sup> See *Ficklen v. Shelby County*, 145 U. S. 1, 23-4; *Pollock v. Farmers' Loan and Trust Co.*, 157 U. S. at pp. 576-8, and *cas. cit.*; *Woodruff v. Parham*, 8 Wall. 123, 133.

Congress in a single State, but whose constitutionality has never been doubted, so far as I am aware.

Hence I can not perceive that the five per cent. duty on coffee, levied in Porto Rico for local purposes, is a violation of the Constitution, although coffee is admitted free of duty into the States of the Union. The exemption of Spanish and English literature, however, so far as it is not shared by the States, seems to be unconstitutional and void; for Congress can not make imposts lighter in territories than in States. The immediate covering of the foreign import duties into the local treasury of the island seems to be unobjectionable. Under the uniformity clause they must be regarded as collected for the common defense and general welfare, but if they were forwarded to the national treasury, they could be at once appropriated for Porto Rico and sent back again—a useless circuitry.

But taxation of imports from the States of the Union into Porto Rico is of very questionable validity, whatever be done with the proceeds collected, and whether or not the island be part of the "United States." The prohibition against taxation of exports is not in form a limitation upon any particular grant of power. It is an absolute prohibition, without exceptions. Now it has never been held that either Congress or a State can tax exports to a territory. The courts have only considered the cases of inter-State and foreign commerce. It is altogether probable that the doctrine of Mr. Justice Miller will be adhered to by the Supreme Court, and applied to the clause prohibiting the taxation of exports by Congress, although perhaps not absolutely impossible that the court may retrace its steps and apply the older doctrine. It is altogether probable, in other words, that the court will never apply the prohibition to inter-State commerce, nor yet to commerce between the States and the immediately contiguous territories. The restricted meaning thus given to the word, however, is based upon its common usage; and I think that few would ever have hesitated to say that goods sent to a land far beyond seas, like Alaska, Hawaii or Porto Rico, are exports in the narrowest sense of the word, and within the mischief which our forefathers sought to avert. Hence it seems reasonable to expect that the export trade to our new outlying dominions will be freed from these duties.

There is no prohibition upon the taxation of exports from a territory for local purposes, and if Congress had laid an export tax upon goods about to be shipped from Porto Rico to our ports its legality might have been sustained. It may be suggested that the reasoning applied to exports from our ports into



Porto Rico would apply here also, and that the transference of the place of collection from the point of departure to that of arrival does not change the character of the tax. The duty is objectionable, however, upon another ground. When the tax on exports from Porto Rico is laid here, and to be paid by us, it is unconstitutional because there is no power to tax us for the local purposes of a territory. The invalidity of this provision of the new act seems clear and indisputable.

Into the wisdom and morality of these taxes it is not the province of this article to go. Nor yet shall I consider what bearing any of its arguments may have upon the future of Hawaii, Guam, or the Philippines. Judge Baldwin has suggested that the Supreme Court may yet deprive us, or relieve us, of those islands, by ruling that the Constitution gives to Congress and the Executive no power to annex, either as States, territories, colonies or subject provinces, dominions which are no part of America.<sup>15</sup> The establishment of such a principle would remove one set of questions, and substitute other questions for solution, as to the legal effect of our *de facto* occupancy; but many acts of our officers would be protected by the doctrine that the courts do not decide purely political questions;<sup>16</sup> and Congress could lawfully compensate persons injured by unconstitutional interference in trans-Pacific affairs.<sup>17</sup>

But there is one gross fallacy which should be noticed in closing this discussion, a fallacy which seems widespread, and which is applied to Porto Rico and to Oceanica alike. I refer to the supposition that Congress and the Executive can turn our Republic into an Imperial "world-power" at their discretion because to conquer or buy the earth and rule it in subjection, is an attribute of sovereignty, and because we have no smaller degree of sovereignty than the greatest of European colonizing nations. It is very true that we have every power of sovereignty in the highest degree—that we have power to establish for ourselves the colonial system of Rome or England, the domestic institutions of Spain or Russia, the religion of Thibet or Sulu. But we have not necessarily delegated these powers to our present rulers; and whatever powers we have not delegated to them, or to the State Governments, we have reserved for ourselves.

---

<sup>15</sup> 12 Harvard Law Review 409.

<sup>16</sup> *Jones v. United States*, 137 U. S. 212; *In re Cooper*, 143 U. S. 503.

<sup>17</sup> *United States v. Realty Co.*, 163 U. S. 427, 432-4, 440.

The Constitution was not made so flexible as to permit of the exercise by government officials, without a new appeal to the people, either of powers expressly denied or of powers neither expressly nor impliedly granted. We, the People, acting in the prescribed form, may tax exports, attaint unpopular politicians, grant titles of nobility, or establish empires in the South Seas. I do not understand that our rulers can do any of these things without consulting us; and if they wish to do them, they must secure the approval of two-thirds of our representatives in each House of Congress, and then secure the assent of at least thirty-four States, either by application to their Legislatures or by direct appeal to their voters; for Congress may call together State Conventions if it pleases. Whenever our rulers are supported by the American people with sufficient unanimity to justify such very grave as well as novel steps as are now being taken, it ought to be possible to obtain an amendment to the Constitution without the slightest delay.

EDWARD B. WHITNEY.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 85 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,  
ROBERT H. GOULD,  
LESLIE E. HUBBARD,

WARREN B. JOHNSON,  
ARCHIBALD W. POWELL,  
GEORGE ZAHM.

## Associate Editors:

M. TOSCAN BENNETT,  
JOHN HILLARD,  
WILLIAM H. JACKSON,  
CORNELIUS P. KITCHEL,

GEORGE A. MARVIN,  
ROBERT L. MUNGER,  
HENRY H. TOWNSHEND,  
THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

## RAILROAD MORTGAGES—PREFERENCE OF MATERIAL MEN.

The present number of the Supreme Court Reporter (20 Sup. Ct., No. 8) contains in the two cases of *Southern Railway Co. v. Carnegie Steel Co., Limited*, p. 347, and *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, p. 363, a valuable exposition of the law as to the preference that claims against the current income of a railroad have over a mortgage debt. In the *Carnegie Steel Co.* case a claim for steel rails furnished eleven months prior to the appointment of a receivership over the railroad, the rails being necessary to keep the road in running order, was given preference over the claims of mortgage creditors. The law as to this was settled in the case of *Fosdick v. Schall*, 99 U. S. 235, on grounds so logical and eminently just that its authority is unquestionable. But in the present case the time limit of six months, the extreme time yet set within which claims must be created in order to acquire this preference, is broken in upon for the first time. *Turner v. Indianapolis*, 8 Biss. (U. S.) 315. The principle of *Fosdick v. Schall* is that certain claims are of such a nature that the creditors look to the current earnings of the road for their payment. Current earnings are matters of at

least yearly compilation. It would seem therefore that the eleven months allowed in the present case is about the limit within which such claims can be created and priority given to them. Debts older than this raise at least the presumption that they rely more upon the general credit of the company for satisfaction than upon the current expenses. When such is the case the principles of *Fosdick v. Schall* hardly apply. *Thomas v. Peoria R. R.*, 36 Fed. 808. The principles to be drawn from the present decisions of the Supreme Court seem to be briefly these: In order to give preference to the claims of material men over mortgage creditors (1) such claims must be created within some limited time to be settled by the circumstances of each case; (2) they must be against the current earnings of the road, not against its general credit; (3) they must not be secured by collateral security; (4) they must be for such repairs to the road as are required to put it in safe condition, and not so extensive as to amount to practical reconstruction; (5) they must be for a special kind of material and labor. These principles should be kept clearly in mind, for some State courts have gone so far as to say that almost every claim of material men against a railroad must be paid before the mortgagee. Such a decision is undoubtedly wrong, not only being unjust to him who has lent the railroad his money, but also giving a greater security to some creditors than they deserve. The principle of *Fosdick v. Schall* is undoubtedly good law within the limits that seemed well established prior to this Carnegie Steel Co. case, and while the change made by this case seems proper and just, a limit has now been reached by this decision which it would seem can not be overstepped with impunity.

#### ENGAGEMENT TO MARRY, A STATUS—STATUTE OF FRAUDS.

The authorities are united in distinguishing marriage from ordinary civil contracts, declaring it the most prominent of that class of contractual relationships, each of which is termed a status; Schouler Dom. Rel., sec. 13. Nevertheless is not the agreement to enter into this status at a future time in itself simply an executory agreement, the peculiar properties of the marriage relationship not attaching until the executory contract is consummated and the legal status brought into being? There are many authorities to this effect, declaring that an agreement to marry is affected by the various rules and regulations which govern any contract, and if the promise is not to be performed within one year it falls within the fourth section of the Statute of Frauds, requiring such contracts to be in

writing. *Ullman v. Meyer*, 10 Fed. 241; *Nichols v. Weaver*, 7 Kans. 373. Confusion has arisen, in cases which apparently are at variance with these authorities, by a failure to distinguish between an agreement to marry *at a certain time* and a promise to marry *within such time*. In the latter case the agreement may be performed at any time; hence, it does not fall within the provision of the statute respecting agreements which are not to be performed within a certain time. *Lawrence v. Cooke*, 56 Me. 193; *Linscott v. McIntire*, 15 Me. 201.

In the recent case of *Lewis v. Tapman*, 45 Atl. Rep. 459 (Md.), the court recognizes the above distinctions, but still declares that the agreement to marry, not to be performed within a year, is not affected by the fourth section of the Statute of Frauds. Chief Justice McSherry, writing the opinion of the court, associates the nature of an engagement so intimately with that of marriage that he attributes to the former the peculiarities of a status, such as marriage itself possesses. It is difficult to see how the authorities support this position. The leading cases opposing the necessity of a writing to evidence an agreement to marry not to be performed within a year, are, first, the case of *Brick v. Flannigan*, 36 Hun. (N. Y.) 52, which takes such position for the reason that the title to the New York Statute of Frauds clearly indicates that it is to apply only to goods, chattels and things in action; and, second, the case of *Blackman v. Mann*, 85 Ill. 222, which announces the more difficult doctrine of a continuing contract, by which it is considered that so long as the parties exchange the various attentions incident to an engagement, so long do they each continually promise the other to consummate the marriage at the specified time. But if these attentions cease, and if the date of marriage is further removed from such time than a year, the statute applies. This is suggested in the same case which announces the rule.

Hence, the case under consideration is clearly a new step in the direction of elevating the importance of an engagement to marry, giving it such attributes of a status that under no circumstances does the fourth section of the Statute of Frauds apply. The court founds its conclusion also on the doctrine that there was no civil action for the breach of a promise to marry when the Statute of Frauds was passed, hence the statute does not apply to such agreements. But in this connection it must be remembered that numerous contractual remedies have been granted since the passage of that statute, which then were denied; and that each has been brought to the test of the statute's provisions. *Derby v. Phelps*, 2 N. H. 515.

## INJURY TO UNBORN CHILD—ITS RIGHT TO SUE.

In the fall term of the Superior Court of Hartford County, Conn., Roraback, J., decided that an infant could not maintain an action for injuries received while in "ventre sa mere." We find the same point decided in the same way in *Allaire v. St. Luke's Hospital*, 56 N. E. Rep. 638, Boggs, J., dissenting. We infer that the court makes no distinction between injuries arising from negligence or intention, by the mother or third parties; or resulting from wrongful act of one having notice of its existence and paid for its care, and one who has no knowledge of its existence whatever. The reasons given are that the infant in its prenatal stage is "pars viscerum matris;" and that no precedent can be shown to support this unheard-of action.

The two prior cases against the infant's right to sue are differentiated from the present one, in that, *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (decided in 1884), was an action by the administrator for a child prematurely born and dying immediately, while the infant here survived; and that in *Walker v. Railway Co.*, 28 L. R. A. (decided in 1891), the ground of the decision was the lack of notice on the part of the railway company of the child's existence; the defendants here knowing the mother to be encephalic and receiving pay for care of mother and child.

At the earliest common law the infant was "pars viscerum matris" merely. But the rule of the civil law considering it as in esse for all beneficial purposes soon softened the rigor of the common law. The infant could take by devise and under the statute of distributions; could be vouched on a recovery, be an execution, and have an injunction lie in its favor. *Hellerson v. Woodford*, 4 Ves. 227. In this case Bullor, J., asked: "Why should not children in ventre sa mere be considered as generally in existence? They are entitled to all the privileges of other persons." As to property rights this principle is undisputed. Is there sufficient reason to keep it from including actions of tort?

In *Walker v. Railway Co.*, cited supra, which contains the learning on this subject, the chief justice was non-committal, the others against this right. In arguing against it, O'Brien, Asst. J., puts very forcibly the impossibility of proof, and the danger of making "lulus scientiæ" out of "lulus naturæ" in a court of law. There is force in this, but not enough, we submit, to justify depriving an infant of his action, where he can show the causal connection, merely because of the difficulty of proof in general. Were a

doctor deliberately and with malice, to put out the eyes of an unborn infant, should not the infant, if it survives, have its action? Its injury is the mother's only by a fiction of the law—perhaps the mother could only sue for loss of services; a loss insignificant compared to the infant's loss of his eyes. The loss is peculiarly his, and will have to be born by him while he lives, so there seems no good reason why in such a case it should not recover from the wrong doer.

It is true there is no precedent. As such occurrences are not infrequent, as observed by O'Brien, Asst. J., in *Walker v. Railway Co.*; this bears against the right, but not, we think, conclusively. "Precedents," says Mansfield, J., "were to illustrate principles and give them fixed certainty." While there is no precedent, the civil law rule considering the infant as "in esse" when it was for its benefit to do so, is a living principle in our law to-day, and there seems to be no such distinction between rights of property and rights to actions of tort, to admit the infant to one and exclude it from the other. Under Lord Campbell's and similar acts, an infant "in ventre sa mere" can sue for the death of its relative that took place while it was yet unborn. *The George v. Richard*, L. R. 3 Adm. & Ecc. 466; *Nelson v. Galveston R. R.*, 78 Tex. 62.

Although the Illinois court did not consider the argument by analogy of O'Brien, C. J., in *Walker v. Railway*, cited supra, and although the learned chief justice left it "an open question," his reasoning seems very convincing. It is undisputed that the State can punish as murder or manslaughter a wilful injury to an unborn infant, that results in death after parturition has taken place and its independent existence has begun. Now, if all crimes are also private wrongs, affecting the individual and also the State, 4 Black. 6, the infant has suffered a private wrong. Is it any less a private wrong if instead of being killed the infant was crippled for life? There seems no cogent reason for giving to an infant for purposes of righting public wrongs a status that is to be denied it when seeking redress for its private wrongs.

If this right is given, it is clear that it should be restricted. In the early period of gestation, as remarked by Boggs, J., in the present case, the infant may well be considered as "pars viscerum matris." But when the foetus reaches a stage, where, if the mother should die, it might live, as was the case in *Allaire v. St. Luke's Hospital*, justice might best be subserved by giving the infant his action.

## RECENT CASES.

**BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE—IN RE HAMMOND**, 98 Fed. 845.—Within four months of filing of petition in bankruptcy, a creditor attached property of bankrupt's wife, she not having filed certificate making her a feme sole trader. The trustee in bankruptcy instituted proceedings for the recovery of said property. *Held*, that it was within the jurisdiction of the District Court to compel such surrender.

As the attachment was in connection with proceedings in bankruptcy, the presumption would be in favor of Federal Court jurisdiction under the act of '98, and the weight of authority seems to sustain the decision reached. *In re Francis-Valentine Co.*, 94 Fed. 793. The attachment was through the State Courts, and hence there may be grounds for disputing the jurisdiction of the District Court, as was held in the majority opinion of *In re Abraham*, 93 Fed. 767.

**BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEES**, 99 Fed. 546.—The trustee in bankruptcy brought a bill in equity to set aside a sale of goods to the defendants, as being fraudulent to creditors. The suit was brought in the District Court, and, relying upon a clause in the Banks Act, 1898, § 23 b, providing that "suits by the trustee shall only be brought in the courts where the bankrupt might have brought them," the respondents demurred to the bill on the ground that the District Court lacked jurisdiction. *Held*, that the court had jurisdiction.

The decisions of the courts upon this question have been far from uniform. The section of the Banks Act quoted above, however, was simply a limitation of the jurisdiction of the Circuit Courts. It does not affect the jurisdiction in bankruptcy conferred upon the District Court in other clauses of the Act. *In re Sievers*, 91 Fed. 366; *Carter v. Hobbs*, 92 Fed. 594. As regards State courts, this decision is not to be taken as a limitation of their jurisdiction in suits brought by trustees in bankruptcy, but the court taking cognizance of the case first shall have final and conclusive disposition of it. *Woolridge v. McKenna*, 8 Fed. 650; *In re Bruss, Ritter Co.*, 1 Nat. Banks, N. 58, 90 Fed. 651.

**CARRIERS—BAGGAGE—COMMERCIAL TRAVELER—SAMPLES—EXTRA COMPENSATION—TRIMBLE V. NEW YORK CENT. AND H. R. R. Co.**, 56 N. E. 532 (N. Y.).—*Held*, that where a baggageman received a trunk from a traveling salesman for transportation, making extra charge for overweight, the company could not escape liability for its loss on the ground that the baggageman had no authority to check the baggage in violation of a rule of the company against checking baggage of this class without the signing of a release of liability by the shipper. Parker, C. J., and O'Brien and Landon, J. J., dissenting.

The question raised in this case is, whether the baggageman had knowledge of the contents of the trunk when he checked it. Since he asked no questions the presumption is against him. If anything is delivered to a person to be carried it is the duty of the person receiving it to ask such questions about it as may be necessary, or he is bound to carry the parcel as it is. *Walker v. Jackson*, 10 M. & W. 168. O'Brien, J., in a dissenting opinion, holds that the baggageman had no knowledge of the contents of the trunk, except from its appearance, which does not constitute knowledge, and therefore the company should not be held liable.



**COMMON CARRIERS—CONTRACT LIMITING LIABILITY—JENNINGS v. SMITH**, 99 Fed. 189 (Ill.).—Plaintiff, with full knowledge of facts, signed a contract providing that in consideration of a lower rate of freight, his recovery in case of damage should be limited to \$100.00 for each horse shipped. *Held*, notwithstanding an Illinois statute to the contrary, that the contract was binding on the shipper.

The opinion in this case is by no means clear and would seem at first glance to be at variance with the rule laid down by the Supreme Court in the leading case of *N. Y. C. R. R. Co. v. Lockwood*, 17 Wallace 357 (1873). In *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397 (1888), the case on which the judge bases his opinion, *Hart v. R. R. Co.*, 112 U. S. 331 (1884), is approved as being in accordance with the Lockwood case. However, here the common carrier is not denying its liability for loss resulting from the negligence of its servants, but merely limiting the amount of such liability. In view of the fact that the common carrier and the individual are by no means on an equal footing, to prevent a dangerous extension of this exception, the reasonableness of the exemption must always be the criterion. In New York State, however, a contrary doctrine has long since been established, and the carrier can exempt itself from every claim of damages, even though same be occasioned through fault on its part, provided that the contract of transportation fairly embodies such exceptions. *Plattsburg v. Erie R. R. Co.*, 43 N. Y. 123.

**CARRIERS—FREE TRANSPORTATION—CONSTITUTIONAL LAW—ATCHISON, T. & S. F. RY. CO. v. CAMPBELL**, 59 Pac. 1051 (Kan.).—*Held*, that the statute (Chap. 167, Laws 1897) requiring railroad companies to furnish free transportation to a drover accompanying a car of stock, at the usual price of shipment, to and from his destination, is a deprivation of property without due process of law and unconstitutional under the fourteenth amendment of the Federal Constitution.

While it is well settled that the Legislature has a certain control over rates, the extent of this control has not been so well settled. This is an extreme attempt, but the opinion is sustained on the principle of *Railroad Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 685, in its reversal of 72 N. W. 328 (Mich.). See also cases cited in note to *Winchester v. L. Turnp. Road Co. v. Crorton*, 33 L. R. A. 177 (Ky.)

**CARRIERS—INJURY OF PASSENGER AT STATION—CONTINUANCE OF RELATION—CHESAPEAKE & O. R. CO. v. KING**, 99 Fed. 251 (Ky.).—Passenger, having properly left train at a place where it was necessary to cross intervening tracks in order to reach a public road, was injured in crossing such tracks. *Held*, that company was liable, as there was an implied agreement not to make such exit unnecessarily dangerous.

Many jurisdictions hold it to be negligence per se if a traveler fail to look and listen before crossing a track. *R. R. Co. v. Houston*, 95 Fed. 697. But in this case it is held that the person using the means of egress provided by the company was still a passenger, and, as such, while not excused from all care, was nevertheless entitled to expect a high degree of care on the part of the carrier. The question of passenger's negligence is usually one of fact for the jury. *Graven v. MacLeod*, 92 Fed. 846.

**CARRIERS—PASSENGER ELEVATORS—NEGLIGENCE—OWNER'S LIABILITY—GRIFFIN v. MANICE**, 62 N. Y. Sup. 364.—The plaintiff sues, as administratrix, to recover damages for death of her husband, which she claims was caused by the negligence of defendant. The decedent was killed by the falling of some weights attached to certain cables intended to be used in operating an elevator

in defendant's office building. Plaintiff claims that defendant was negligent in not having the elevator properly inspected and kept in a safe condition. *Held*, that defendant was liable for negligence.

The court decided this case entirely on the ground that the owner of an elevator is a carrier of passengers, and as such, is under obligations to use the utmost care and diligence in providing and maintaining safe and suitable appliances. *Mitchell v. Marker*, 62 Fed. Rep. 139; *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222. The same degree of care is not necessary with reference to the surroundings and other structure forming a part of the elevator plant. *McGrell v. Building Co.*, 153 N. Y. 271. When accident occurs through the giving way of some portion of the machinery or appliances by which the passenger is carried, in absence of rebuttal testimony offered by carrier, plaintiff is held to have made out a *prima facie* case, establishing the negligence of carrier, and entitling him to recover. *Amer. and Eng. Ency. of Law* (new ed.), vol. 10, page 948; *Treadwell v. Whittier*, 80 Cal. 574; *Goodsell v. Taylor*, 41 Minn. 207.

**CARRIERS—WRONGFUL EJECTION OF PASSENGERS—LIABILITY—LOUISVILLE H. & ST. L. RY. CO. v. JOPLIN**, 55 S. W. 206 (Ky.).—In this case the appellee had purchased a ticket on appellant's line, and lost it out of the car window just as the train started. He offered to pay the conductor his ticket fare, which the conductor accepted. Shortly afterward the conductor came back and demanded the train fare, an additional sum which companies are allowed to charge those who travel with no ticket. Appellee refused to pay this sum and was ejected from the car by the conductor in a lonesome spot. *Held*, that he could recover.

The conductor has no right to eject a passenger after having received, as satisfactory, his ticket fare. *Wardwell v. Chicago, etc., Ry. Co.*, 56 Minn. 514. It is a well established rule that if a ticket be lost and the owner refuse to pay the fare, he may be summarily ejected. But in this case the conductor having accepted the ticket fare, is precluded from demanding the residue. It may be distinguished from that line of cases where the conductor, having discovered his mistake, is allowed to demand the remainder. *Wardwell v., Chicago, etc., Ry. Co.* (supra). In this case no discovery of a mistake is alleged.

**CHATTEL MORTGAGES—ADVANCES TO "CROPPER"—TENANCY IN COMMON—MCNIEL v. RYDER**, 81 N. W. 830 (Minn.).—This was a contract for the cultivation of a farm on shares, by the terms of which the landlord reserved the title to the cropper's share of the crops raised, as security for advances made to him. *Held*, that the parties thereto, until division, were tenants in common of the crops, and that the contract was in legal effect a chattel mortgage, and was required to be filed on record, as against creditors and subsequent bona fide purchasers.

There is some diversity of opinion in other jurisdictions over this question. See note 1, 8 *A. & E. Encl. of L.* (2d ed.) 323; but the weight of authority seems to be that the legal title, control and possession of the crops shall remain in the owner of the land until the cropper has fully performed, and until there has been a division of the crops, the reservation or contract does not operate merely as a mortgage to secure the landlord, but the title of the entire crop is in him, and it can neither be sold by the tenant, nor levied on by his creditors. 8 *A. & E. Encl. of L.* (2d ed.) 323-325, and cases cited.

**CHECKS—OPERATION—TRANSFER OF TITLE—RICKERT v. SUDDARD ET AL.**, 56 N. E. 344 (Ill.).—The Mechanics and Traders Savings, Loan & Building Association gave to Mabel T. Rickert, upon her withdrawal from the association, a check on the American Exchange National Bank of Chicago, where the association had sufficient funds to meet it. Before presentation of the check the

State Auditor took charge of the affairs of the association, including the money in the bank. *Held*, that plaintiff was entitled to the full amount of the check, though the association was insolvent at the time it was given.

The doctrine that is sustained by the weight of authority in the United States, is that an unaccepted check drawn in the ordinary form, not describing any particular fund, or using words of transfer of the whole or any part of any amount standing to the credit of the drawer, does not amount to an assignment at law or in equity of the money to the credit of the holder. *Harrison v. Wright*, 100 Ind. 515; *Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221. Some States hold that the giving of a check transfers to its holder the title to so much of the money in the bank as the check calls for. *Chouteau et al. v. Rouse*, 56 Mo. 65. Under the Negotiable Instruments Act, now in force in New York, Connecticut, Massachusetts and some other states, a check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check.

CONSTITUTIONAL LAW—DEPARTMENT STORES—POLICE POWER—TAXATION—STATUTES—VALIDITY—STATE EX REL. *WYATT V. ASHBROOK ET AL.*, 55 S. W. 627 (Mo.).—An act passed in Missouri in 1899, known as "The Anti-Department Store Act," divided merchandise into a certain number of classes, and prohibited any person, firm or corporation, in towns of 50,000 inhabitants or more and employing fifteen or more clerks, from selling goods of more than one class without first paying a special tax of not more than \$500 or less than \$300, to be determined by the different commissioners for each city. *Held*, to be unconstitutional.

Such an act is not a proper police regulation, so it contravenes the Constitutional provision which vests the taxing power for municipal purposes in the municipal corporations under authority of the General Assembly. It also violates the Constitutional provision that all taxes for public purposes shall be uniform on the same class of subjects within the limits of the authority levying the tax, and that all taxes shall be levied and collected by a general law. It is aimed directly at department stores in large cities, and as such is distinctly class legislation. *State v. Trenton*, 42 N. J. L. 486.

CONTRIBUTORY NEGLIGENCE—STREET REPAIRS—*TATJE V. FRAWLEY*, 27 South. Rep. 339 (La.).—Defendant contracted with the City of New Orleans to re-arrange the guttering on a certain street, protecting public safety with lights, etc. A hole of three feet in the gutter was left without light or boarding over, into which defendant fell when running for a car at night. *Held*, no recovery.

While the court virtually concedes the negligence of the defendant, it further announces that a man running for a car at night is necessarily so intent on catching the car that he does not take proper care of where he is going, hence finds plaintiff guilty of contributory negligence. Judge Blanchard dissents, but writes no opinion. See *Mahan v. Everett*, 50 La. Am. 1167.

CORPORATIONS—DIVIDENDS—TRUST FUNDS—*HUNT V. O'SHEA*, 45 Atl. Rep. 480 (N. H.).—Suit is brought against defendant as assignee of an insolvent company for a dividend declared some time before its insolvency on stock held by plaintiff, but which dividend was not collected. *Held*, a recovery may be had only on a basis with other creditors.

A dividend declared by a corporation is not a trust fund for the stockholders' benefit, but a debt from the corporation to them. *Lowne v. Ins. Co.*, 6 Paige 482, 1 Mor. Priv. Corp., § 445. However, if the company had set funds aside to pay the dividend a trust would have resulted, and the plaintiff would have recovered the entire dividend. *King et al. v. R. R. Co.*, 29 N. J. L. 82.

**CORPORATION—ORGANIZATION—LIABILITY OF STOCKHOLDERS AS CO-PARTNERS—***SLOCUM v. HEAD ET AL.*, 81 N. W. 673 (Wis.).—Defendants claim that they are a corporation, incorporated under Chapter 113, Laws of 1874, to carry on a general banking business. They had failed to comply with all the statutory requirements, but had by the manner in which they had carried on their business and by their intent become a corporation de facto. Plaintiff sues to recover a sum of money deposited with defendants, and seeks to hold the stockholders liable as co-partners on the ground that defendant's cashier had informed plaintiff that defendants were partners. *Held*, that on the evidence defendants were liable as partners.

In general one who contracts with a corporation as such is estopped from denying its corporate existence, or the regularity of its organization. *Amer. and Eng. Ency. of Law* (old ed.) Vol. 4, p. 199; *Johnson v. Gibson*, 78 Ind. 282; *Chubb v. Upton*, 95 U. S. 666. But where plaintiff had dealt with an agent, and was apparently ignorant that the principals even claimed to be a corporation, they were held liable as partners. *Martin v. Fewell*, 79 Mo. 401.

**DAMAGES—MENTAL ANGUISH—BREACH OF CONTRACT—***JONES v. TEXAS AND N. O. Ry. Co.*, 55 S. W. 371 (Tex.).—Plaintiff sued on a breach of contract for damages for mental suffering and loss of time sustained by reason of defendant's agent's negligence in not stopping a train. *Held*, he could not recover, his anxiety and circumstances not being known to the station agent.

Some courts have held that damages for mental anguish cannot be recovered unless connected with bodily pain. *Tripp v. St. Louis, etc., Ry. Co.*, 74 Mo. 147; *Spohn v. Missouri Pac. Ry. Co.*, 116 Mo. 617. Others, and this seems the better rule, hold that mental suffering, though not sufficient per se to support an action, may constitute an element of damages when it results from an injury sufficient to give rise to an action. *Stretry v. Chicago, etc., Ry. Co.*, 73 Wis. 147; *Missouri Pac. Ry. Co. v. Kaiser*, 82 Tex. 144; *Sedgwick on Damages*, § 44. There seems to have been a sufficient injury in this case to give rise to an action, since for a failure to carry, a passenger can recover for the actual loss sustained by him. *Indianapolis, etc., Ry. Co. v. Birney*, 71 Ill. 391; But the courts have always held that only such damages for a breach of contract are recoverable as are reasonably within the contemplation of the parties when the contract was entered into. *Burton v. Pinkerton*, L. R. 2 Exch. 340; *Walrath v. Whittekind*, 26 Kan. 482. The station agent not being informed by the plaintiff that it was necessary for him to take that train, or what damages he would sustain if he did not take it, the court properly held that there could be no recovery for mental suffering incurred by the agent's ignorance.

**DURESS—AVOIDANCE OF CONTRACTS—***JAEGER v. KOENIG*, 62 N. Y., Sup. 803.—Where plaintiff paid money to defendant equal in amount to a sum stolen by her husband under threat of prosecution in case of non-payment, *held*, duress, and money so paid recoverable. See discussion of *Bank v. Cox*, immediately following.

**DURESS—MORTGAGES—***NATIONAL BANK OF REPUBLIC OF NEW YORK v. COX*, 62 N. Y., Sup. 314.—Action brought to foreclose a mortgage alleged to have been made by defendant. Defendant's son had forged checks on plaintiff bank, using name of one Minor. Minor had sued bank to recover amount of forged checks. Defendant claims that she was induced to execute the mortgage by promises that the bank and Minor would not prosecute her son if she executed the mortgage. These promises and threats were made to her before one Fisher, who claimed that he had made the arrangements with the bank and Minor. *Held*, that mortgage was executed under duress and was voidable, though the bank had never authorized the statements.

This case resembles *Jager v. Koenig*, just preceding, and both together would seem to clearly settle the present law of New York on the subject of duress. Whether it is duress *per minas* to threaten to do what one has a legal right to do, namely, to prosecute for a criminal act, is not definitely settled by the decisions. On the one hand some jurisdictions hold that threats to coerce the undoing of an act of which the party has been guilty are not threats of unlawful imprisonment. Cf. *Thorn v. Pinkham*, 84 Me. 103; *Knapp v. Hyde*, 60 Barb. (N. Y.) 80. Other jurisdictions, however, hold that such threat is of unlawful imprisonment when made for the sole purpose of inducing the execution of a contract or conveyance, even though the party was guilty of the charge for which prosecution was threatened. Cf. *Morse v. Woodworth*, 155 Mass. 235. This is also the later view of the New York courts. Cf. *Schoener v. Tisser*, 107 N. Y. 111; *Adams v. Bank*, 116 N. Y. 606; *Jaeger v. Koenig*, 62 N. Y., Sup. 803, *supra*.

**EMINENT DOMAIN—IMPROVEMENTS ON RIGHT OF WAY—ST. LOUIS K. & S. W. R. CO. v. TRYCE ET AL.**, 59 Pac. 1040 (Kan.).—A railroad company obtained deeds for mortgaged land and built its road thereon. The mortgage being foreclosed, the railroad company instituted condemnation proceedings against the new owner. *Held*, that improvements placed upon the land by the railroad and necessary to the operation of the road, are trade fixtures and not accessories of the land to which they are attached, and are not to be recovered for when the land is condemned.

This case overrules *Briggs v. Railroad Co.*, 43 Pac. 1131, 56 Kan. 526, which held that the improvements became real property and might be recovered for by the owner of the land when condemned by the railroad. The result reached in the present case undoubtedly accords with the weight of authority as to what may be recovered for. *Am. Eng. Ency. of Law* (2d ed.) 10-1159; *Ellis v. Rock Island, etc., R. Co.*, 125 Ill. 82, and cases cited in opinion under review. The difficulty of the courts in reaching this result has been in determining the character of the improvements. The road-bed, rails, depots, etc., were held real property in *Farmers' Loan and Trust Co. v. Hendrickson*, 25 Barb. 493; personal chattels, in *Albion River R. Co. v. Hesser*, 48 Cal. 435. This opinion and *Northern Cent. R. Co. v. Canton Co.*, 30 Md. 347, solve this difficulty by classing them as trade fixtures.

**EVIDENCE—ADMISSION—REVERSIBLE ERROR—DRURY v. TERRITORY**, 60 Pac. 101 (Okla.).—*Held*, where illegal and incompetent evidence has been permitted to go to the jury and subsequently they are directed to disregard it, if the illegal evidence were of such a character as would ordinarily create such a prejudice against the defendant as was reasonably calculated to make a fixed impression on the minds of the jury, and influence their verdict, and the court is unable to say, on an examination of the whole case, that such evidence did not affect the verdict, there is reversible error.

This is a modification of the rule laid down in *Pa. Co. v. Roy*, 102 U. S. 451, that a subsequent withdrawal from the jury cancels the admission of improper evidence. *Throckmorton v. Holt*, 12 App. D. C. 451. The rule is well established in the United States Courts. The jury are presumed to follow the instruction of the court and disregard improper evidence. *Anthony v. Travis*, 148 Mass. 513; *Smith v. Whitman*, 6 Allen 502. The rule of this case is substantially in accord with *Wersebe v. Broadway & S. A. R. Co.*, 1 Misc. Rep. (N. Y.), 472; *City of Chicago v. Brennan*, 61 Ill. App. 247; *Taylor v. Adams*, 94 Mich. 106. See also *Enc. Pl. & Prac.* 2-560.

**EVIDENCE—EXCLAMATIONS OF PAIN—ADMISSIBILITY—JACKSON v. MISSOURI K. & T. RY. CO.** 55 S. W. 376 (Texas).—Plaintiff having been injured while working in a sand pit, through the negligence of the defendant, sought to introduce evidence of his exclamations of pain uttered after suit had been brought. *Held*, they were admissible.

Such exclamations as are natural and spontaneous utterances caused by present pain, are competent testimony. *Fay v. Harlan*, 128 Mass. 244; *Wheeler v. Railway Co.*, 43 S. W. 876. They are part of the res gestae and not hearsay evidence. Under proper circumstances, they are admissible, even after suit has been instituted. *Ry. Co. v. Newell*, 104 Ind. 264; *Quaife v. Ry. Co.*, 4 N. W. 658. Greenleaf on Evidence: "The mere fact that a suit was pending would not exclude such testimony." 1 Green, § 626.

**FRAUDULENT CONVEYANCES—HOMESTEAD—TRANSFER TO WIFE—KETTLE-SCHLAGER v. FERRICK**, 81 N. W. 889 (S. D.).—A transfer of the homestead from the defendant to his wife, was made to prevent creditors from subjecting the premises to the satisfaction of their claims. Seven years afterwards the defendant removed to a new homestead, and an action was then brought by a judgment creditor to set the deed aside as fraudulent. *Held*, that the deed of conveyance did not pass title, but was colorable only, and should be set aside, as the mere contrivance of a dishonest debtor; 60 Texas 139.

The rule in some jurisdictions is that such a conveyance, whether made to defraud creditors or not, would still be valid, as such property cannot be subject to a fraudulent conveyance, for the reason that the rights of no creditor can be prejudiced by it. *Patten v. Smith*, 4 Conn. 450; *Bump on Fraud*, Con. p. 268; *Deutzer v. Bell*, 11 Wis. 114.

**GIFT—DEPOSIT IN BANK—PENINSULAR SAV. BANK v. WINEMAN ET AL.**, 81 N. W. 1091 (Mich.).—Where a husband deposited money in a bank to his wife's credit, and a pass book was issued in her name, the wife not knowing that the money was deposited to her credit until after her husband's death, *held*, in the absence of acts and declarations indicating an intention to donate the fund, it did not constitute a gift. *Broderick v. Bank*, 109 Mass. 149; *Sherman v. Bank*, 138 Mass. 581; contra, *Howard v. Bank*, 40 Vt. 597.

**INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENT—A. B. FARQUHAR CO., LTD., v. NATIONAL HARROW CO.**, 99 Fed. 160 (N. J.).—The owner of a patent sent out circulars saying that complainant infringes such patent, that complainant is not financially responsible, and that the recipients will be subjected to suit if they continue to handle the infringement. *Held*, that a court of equity will not enjoin the sending out of such circulars.

The English courts have generally granted an injunction to restrain libelous publications against the business of another. The current of American decisions has been the other way on the ground of there being an adequate remedy at law for the alleged libel. It will be seen that this case is at variance with *Adriance, Platt & Co. v. Nat. Harrow Co.*, 98 Fed. 118, 9 YALE LAW JOURNAL 233, which seems to incline to the English rule, and it will also be noted that the state of facts and defendants in the two cases are identical.

**INJURY TO EMPLOYEE—VICE PRINCIPAL—NEGLIGENCE—METROPOLITAN WEST SHORE R. R. v. SKOLA**, 56 N. E. 171 (Ill.).—The foreman of the work of cleaning, repairing and inspecting cars, ran a car into the shed for cleaning. In doing so he ran into a car under which deceased, by order of said foreman, was at work, and killed him. *Held*, foreman was to be considered a vice principal, and that company could be held for the death of the plaintiff's intestate.

The present case is a close one on the question as to the distinction between fellow servants and vice principal, and illustrates the difficulties Shaw, C. J., mentions in *Farwell v. Boston & W. R. Co.*, 4 Metc. 49, when we attempt to draw a distinction between them. The Illinois courts have been more willing to recognize this distinction than have those of Massachusetts. *Toledo R. Co. v. Ingraham*, 77 Ill. 309, and the present case shows to what an extent it may be carried.

INSURANCE—IGNITION—FITZGERALD v. GERMAN-AMERICAN INS. CO., 62 N. Y. Sup. 824.—Defendant insured plaintiff against fire. Smoke and heat from burning lamp produced damage. *Held*, no recovery.

Some authorities announce the proposition that the results of a fire (not amounting to ignition themselves) cannot be the ground for recovery on an insurance policy unless the fire producing these results creates a liability on the policy. *Hughes on Ins.* 390; *Austin v. Drewe*, 6 Taunt. 435; *Gibbons v. Ins. Co.* 30 Ill. App. 263. But equally strong authorities take the other view. *Balestricci v. Ins. Co.*, 34 La. Ann. 844; *May on Ins.*, § 412. This doctrine has been most frequently applied in actions on insurance policies in consequence of explosions and damages arising from adjacent fires. *St. John v. Ins. Co.*, 11 N. Y. 516. *Sohier v. Ins. Co.*, 11 Allen (Mass.) 336.

INTERSTATE COMMERCE—STATE REGULATIONS—OLEOMARGARINE LAW OF MISSOURI—IN RE SCHEITLIN, 99 Fed. 273.—The provision of a State law prohibiting the manufacture or sale within the State of any substance "in imitation or semblance of butter," is a proper regulation within the police power of the State, and its enforcement as to original package importations is not a violation of the constitutional interstate commerce clause.

It was strongly contended that no restrictions or limitations upon the sale of oleomargarine could be made by any State, because the Supreme Court in a leading case decided that it was an article of commerce and declared void a Penn. statute which prohibited its sale even when the same was shipped into the State for sale in the original package. *Schollenberger v. Penn.*, 171 U. S. 1. It is, without doubt, within the police power of a State to pass regulations to prevent fraud and deception as to articles of food. The Missouri statute is distinguished from the former Pennsylvania law in that it did not prohibit the sale of oleomargarine, but merely required it to be sold as such. The case resembles *Plumley v. Webb*, 155 U. S. 461, in which Justice Harlan pointedly said: "The Constitution does not secure to anyone the privilege of defrauding the public."

JUDGMENT AGAINST CITY—TAXPAYERS' RIGHT TO ENJOIN—BUSH v. O'BRIEN, 62 N. Y., Sup. 685.—This an action by a taxpayer under the Statute (Civ. Code 1925), to restrain certain parties from collecting judgments which are alleged to be invalid, against the City of New York. *Held*, a taxpayer cannot enjoin payment of a valid judgment against a city where there is no fraud alleged as to its entry, on an offer by the corporation counsel, and acceptance by plaintiff, and where the only ground on which it is attacked is that it was irregularly entered in a pending action. His only remedy is by appeal from the judgment, or by a motion to set it aside. *McLaughlin, J.*, dissents.

It would seem that if this statute is to be construed so as to preclude such cases as the above, the object of the statute will be defeated. The judgments which it is sought to enjoin are so irregular as to create much doubt as to their validity, to pay them would be a breach of official duty on the part of the Comptroller, and a breach of official duty is sufficient to enable a taxpayer to bring an action. (*Adamson v. R. R. Co.*, 79 Hun 31). In fact all the elements of a right of action exist, "the status of the plaintiff, the illegal judgment, the threatened injury by which the property of the taxpayer will be burdened."

LANDLORD—EVICTION—SICKNESS—PREISER v. WILLANDT, 62 N. Y., Sup. 890. Plaintiff's lease of defendant's premises expired on June 5th. When plaintiff was notified to vacate, he informed defendant that his wife was very ill and could not be moved. On June 6th, defendant started to pull down the house, causing the plaintiff's wife much suffering from the dust and noise,

which so aggravated her illness that she died a few days later. *Held*, that defendant was liable, though deceased suffered no immediate personal injury, and her death was due solely to fright and excitement.

The case of *Herter v. Mullen, et al.*, 53 N. E. 700 settles the question of the tenant's right to hold over without a renewal of the lease, provided the delay was caused by serious illness in the family.

Defendant denied right to recover on the ground that there was no immediate personal injury suffered by Mrs. Preiser. In *Spade v. R. R. Co.*, 47 N. E. 89, it was held that recovery could be had when "gross carelessness or utter indifference to consequences" was shown. And since the landlord was a wrong-doer, the court was justified in reversing the decision of the lower court.

**LICENSES—NON-PAYMENT—PUCKETT v. FORE**, 27 South Rep. 381 (Miss.).—Where plaintiff sold goods to defendant, taking notes and mortgage therefor, one of which notes being for merchandise sold during a time when plaintiff had not paid his privilege tax for conducting business, *held*, non-collectible.

The court fails to recognize a distinction frequently laid down, that where the tax is laid simply for raising revenue, the purchase money of a sale is collectible. *Larned v. Andrews*, 106 Mass. 435, but when the nature of the license is prohibitory, no recovery may be had. *Miller v. Post*, 1 Allen 434.

**LIENS—DUE PROCESS OF LAW—INTERSTATE COMMERCE—LINDSAY & PHELPS Co. v. MULLEN**, 20 Sup. Ct. Rep. 325.—*Held*, a Minnesota statute was constitutional, giving surveyor general a lien upon all logs in any boom, under which plaintiff's logs were seized and held to answer for charges assessed against the whole boom, although plaintiff's logs formed only a part of said boom. The majority of the court gave the following reasons: (1) it was within the power of the legislature; to require the officer to stand watch at the exit of the boom and collect his fees from each log owner would be unreasonable; (2) was not taking property without due process of law, the plaintiff having voluntarily put his logs in the boom; (3) nor was it a burden upon interstate commerce, but rather facilitated it.

In dissenting, Peckham J., with whom three others concurred, argued that the log owner was practically compelled to put his logs in the boom; under these circumstances to seize them for another's debt leaves no doubt of its utter illegality; and a State regulation that confiscates property engaged in commerce for the debts of another is clearly a restriction upon interstate commerce.

**LIFE INSURANCE — SUICIDE — EVIDENCE — SUFFICIENCY — SOVEREIGN CAMP WOODMEN OF THE WORLD v. HALLER**, 56 N. E. 255 (Ind.).—A provision in an insurance policy was as follows: "If the member holding this certificate shall \* \* \* die by his own hand \* \* \* this certificate shall be null and void." The insured, a hard drinker, whose family relations were unpleasant, disappeared after being served with notice of divorce proceedings begun by his wife. His body, without marks of violence upon it, was found in a stream. *Held*, that the evidence excluded with reasonable certainty any hypothesis of death by any other cause than suicide. Robinson, J., dissenting.

The court in this case apparently takes little notice of the fact that in most jurisdictions courts are very reluctant to find that a man died by his own hand when there can be the slightest doubt. The legal presumption is that when death is referable to either cause, it was due to accident and not to self-destruction. *Travelers Ins. Co. of Hartford, Conn., v. Nicklas*, 41 Atl. 906. Where a provision in an insurance policy states that the company is relieved from liability for deaths from suicide, the burden is on the insurer to show the violation of an otherwise valid policy. *Malicki v. Chicago Guaranty Fund Life Soc.*, 77 N. W. 690 (Ill.).



**LIMITATIONS—ASSUMPTION OF MORTGAGE—PAYMENT OF INTEREST—BEDDLE v. PUGH, 45 Atl. Rep. 626 (N. J.).**—*Held*, the payment of interest by successive grantees, who assumed a mortgage, kept the statute from running in favor of mortgagor, notwithstanding sixteen years more than the period required had elapsed since any payment by him.

There are two rules, (1) that a tender to one entitled to receive by one liable to pay is sufficient, and successive grantees come within this rule. *In re Frisbie*, 43 Chan Div. 117; *Lewin v. Wilson*, 11 App. Cas 639; (2) that such grantees pay merely to keep alive the equity of redemption, and do not keep the statute from running. *Trustees v. Smith*, 52 Conn. 434. Where the mortgagor after sale becomes a surety the first seems the better rule, but where by sale of the property in States holding the lien theory he becomes a mere stranger, the second would probably prevail. *Lord v. Morris*, 18 Cal. 482.

**MASTER AND SERVANT—WRONGFUL DEATH OF SERVANT—NEGLIGENCE—INDEPENDENT CONTRACTORS—GULF, C. & S. RY. CO. v. DELANEY, 55 S. W. 538 (Tex.).**—A brakeman on a freight train was killed by the falling of derricks, used by an independent contractor, due to the breaking of a post to which guy ropes were fastened. The independent contractor was repairing defendant's road-bed. *Held*, the railroad company was liable.

An employee, when placed in a situation of danger, has a right to expect that the employer will not, without proper warning, subject him to perils unknown to the employee. *Haley v. Case*, 142 Mass. 316. Moreover, the employer owes his servants, while working on his tracks and his trains, the duty to furnish them a reasonably safe place to work; nothing short of the exercise of reasonable care can absolve him from this obligation. In this case the defendant company were clearly guilty of negligence, as the guy ropes had not been securely fastened, and the derricks ought not to have been used across its tracks, without some care being taken to discover and guard against the danger. As a general rule, the employer is not liable for injuries resulting from fault of an independent contractor, but in this case the negligence of the railway company was properly held to be the proximate cause of the injury.

**MASTER AND SERVANT—INJURY TO SERVANT—SCOPE OF EMPLOYMENT—RAILROADS—NEGLIGENCE—TERRE HAUTE & I. R. CO. v. FOWLER, 56 N. E. 228 (Ind.).**—A freight conductor learning from the road superintendent that two culverts were likely to be in a dangerous condition, detached his engine and started to examine them; the first was found to be all right and they proceeded to the second. In attempting to cross a trestle between the two it gave way and the conductor was killed. *Held*, that considering the emergency the conductor was not acting outside the scope of his employment.

This case is apparently decided against the long established rule of law that the master's liability to the servant extends only to the duty which the servant is employed to perform, and if he undertakes any employment outside that duty he is without remedy if injured. *Brown v. Byroad*, 47 Ind. 435. The question here involved, is whether the detaching of the engine by the decedent, and voluntarily proceeding to inspect the track, was such a departure from the duties of his employment as to constitute negligence per se. The peculiar emergency existing at the time is held to bring the conductor's act within the scope of his employment. *Wood on Master and Servant*, p. 181, says: "Every servant is bound to regard his master's interests, and if a sudden emergency arises in his business, he is justified in departing from the usual routine of his employment."

**PARTNERSHIP—WHAT CONSTITUTES—HAWKINS v. CAMPBELL ET AL., 62 N. Y. Sup. 678.**—Action against Bell and Campbell as partners, to recover an unpaid balance due the plaintiff. Campbell denied the allegation of partnership. *Held*, an agreement whereby the partners were to share the profits of

the business, and showing that each had contributed something to its capital and *possessed a definite interest in the business*, is sufficient to constitute them partners as to third persons, irrespective of their agreement not to be partners, and that the liability of one of them was to be limited to a certain amount.

The rule in New York as to what constitutes a partnership is evidently construed much more broadly than in most other States, as is shown in the case of *Roper v. Shaefer*, 35 Mo. Atl. 30, where it was held, on practically the same state of facts, that a partnership as to third parties did not exist. This latter is the more modern rule. 17 *Am. & Eng. Enc.* 878, and is being followed by most of the States.

**PATENTS—INFRINGEMENT—SALE OF INFRINGING ARTICLE**, 99 Fed. 568.—The defendant collected the various parts of a machine infringing a patent, and then sold them at a profit to the co-defendant, a corporation. He was subsequently hired by the corporation to set up the completed machine. *Held*, that he was liable as an infringer.

The decision disregards the case of *Nickel Co. v. Worthington (C. C.)*, 13 Fed. 393, and follows the principle that a person cannot retreat behind a corporation and escape liability for infringements in which he actively participates. *Cash Register Co. v. Leland*, 94 Fed. 502; *Nat. Car Brake Co. v. Terre Haute Manufacturing Co.*, 19 Fed. 514. The gist of the decision is that everyone who has made a separate profit out of the sale of infringing goods is held liable. *Cramer v. Fry*, 68 Fed. 201; *Maltby v. Bobo*, 53 Fed., cases No. 8, 998.

**PRACTICE—BURDEN OF PROOF—GOOD FAITH—GOWING ET AL. V. WARNER ET AL.**, 62 N. Y., Sup. 797.—Plaintiff sold goods to Gerrish & Co. upon the latter's false and fraudulent representations of its ability to pay. The goods were then sold to defendants, and this action brought to recover possession or their value. *Held*, burden of proof was on defendants to show good faith and not a part of plaintiffs *prima facie* case to prove the contrary.

The presumption of the *bona fide* character of an act does not maintain where the fact of good faith is a material fact in a civil defense. *Devoe v. Brant*, 53 N. Y. 462; *McKelvey on Evi.*, § 54; *Easter et al. v. Allen & Allen* 7.

**PRACTICE—CONCLUSIVENESS OF SHERIFF'S RETURN—TAYLOR V. WELSLAGER**, 45 Atl. Rep. 476 (Md.).—Where defendant claimed that the sheriff, after serving her, returned and told her not to appear, that he made a mistake in serving her. *Held*, sheriff's return of service conclusive. *Bennethum v. Bowers*, 133 Pa. St. 332.

**PRIZE—SALE OF ENEMY'S VESSELS TO NEUTRALS**, 20 S. C. 489.—At the beginning of the Spanish-American war, de Massa, a Spanish subject, made a transfer of the steamer Benito Estenger to Beattie, a subject of Great Britain. Shortly after, as the vessel was on a voyage to Kingston, she was captured by a U. S. patrol and taken to Key West, where she was duly libelled. *Held*, that the vessel was a lawful prize of war.

Formerly transfers of vessels "*flagrante bello*" were held invalid. Even now in France this rule is stringently enforced. England and the United States have departed from the principle, however, and admit the validity of the sale. The circumstances attending the transfer in this case, however, viz.: the conflicting statements as to price, the remaining of the Spanish master and crew in charge of the vessel, the withholding of a certain interest by the former owner, etc., clearly showed the presence of fraudulent intent and the use of the transfer as a protection against Spanish capture. The *January*, 4 C. Rob. 31; the *Omnibus*, 6 C. Rob. 70. J. J. Shiras, White and Peckham dissented.

**RAILROADS—DUTY TO KEEP LOOKOUT AT CROSSINGS—CONTRIBUTORY NEGLIGENCE—CROWLEY v. LOUISVILLE & NASHVILLE RY. CO., 55 S. W. 434 (Ky.).**—Plaintiff, after waiting at a public crossing for a passenger train to go by, started across and was struck by an engine, of the approach of which she had no warning. The evidence showed that if those in charge of the engine had kept a proper lookout, her presence on the track might have been discovered and her injury averted. *Held*, she could recover, though guilty of contributory negligence herself in thus going on the track.

Notwithstanding the negligence on the part of the person injured he may recover, if the railway company, after such negligence occurred, could by the exercise of ordinary care, have discovered it in time to have avoided inflicting injury. *Donohue v. St. Louis, etc., Ry. Co.*, 28 Am. & Eng. R. R. cases 673; *Kelly v. Hannibal, etc., Ry. Co.*, 75 Mo. 138. When the negligence of the defendant is the proximate cause of the injury, and that of the plaintiff only remote, the plaintiff may recover. *Kerwhacker v. R. R. Co.*, 3 Ohio St. 172; *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 521.

**STATUTE OF FRAUDS—NEW AND INDEPENDENT CONTRACT—CONSIDERATION MOVING TO PROMISOR—MANETTI v. DORGE, 62 N. N. Sup. 918.**—Plaintiff was employed by a sub-contractor to build a foundation. During the progress of the work, plaintiff told defendant, the owner of the premises, that he was afraid he would not be paid by the sub-contractor, and intended to abandon the job, whereupon defendant said that he would pay him in case the sub-contractor did not do so. *Held*, that the defendant, in consideration of the benefit to him from uninterrupted work, made a new and independent contract with plaintiff, enforceable by plaintiff on completion of the work.

There is no doubt that this case is correct according to the New York rule, as stated in similar cases, but in many of the states this case would clearly come under the Statute of Frauds. This is shown in *Hooker v. Russell*, 67 Wis. 257, where the court said: "So long as the original debt remains payable by the debtor to his creditor, an agreement by any other party to pay is within the statute, no matter what was the consideration for the latter promise."

**SURETYSHIP—REAPPOINTMENT OF PRINCIPAL—LIABILITY—FIDELITY AND DEPOSIT CO. OF MD. v. MOBILE COUNTY, 27 South. Rep. 386 (Ala.).**—On June 22, 1897, plaintiff-in-error became surety to Mobile County for the faithful discharge of the tax collector's duties. Prior to that time the collector had failed to account for certain funds collected, but faithfully accounted for returns since that day. *Held*, surety is liable.

The fact that a tax collector has collected funds which he fails to account for on a day of adjustment raises a presumption that they will be paid on the next settlement day, hence, even though plaintiff-in-error became surety after the funds were actually misappropriated, it is still held liable for the embezzlement. *Bruce v. U. S.*, 21 U. S. 596.

**TAXATION OF PERSONALTY—VALUATION—STATE v. HALLIDAY, 56 N. E. 118 Ohio.**—The Bell Telephone Co. leased hand telephones to an Ohio concern at \$14 rental per year. The Bell Co. manufactured these instruments under a patent, and were taxed on them at the rate of \$3.42 per instrument, 20 per cent. more than bare cost. The State Auditor directed the County Auditor to assess these instruments at their true value in money, on the basis of the income they produced to the owner, taking into account the value given by the patent right. On application for mandamus the court said, when a manufacturer leases an article made by him under a patent, for a valuable consideration, he should be taxed on its value, though that value be enhanced by a patent. Its true value is what it is worth to him, and the assessor must decide what that is by every fact that he knows bearing on the question.

The true value of an article is its value for the use to which it is put. This doctrine is applied to railroads. *State v. Ill., etc., Ry.*, 27 Ill. 64; *Waterworks. Stein v. Mobile*, 17 Ala. 234. It was denied in regard to a toll bridge. *State v. Metz*, 31 N. J. L. 378.

USURY—EFFECT ON CONTRACT—PROVISION FOR ATTORNEY'S FEES—UNION MTG., BANKING AND TRUST CO. V. HAGOOD ET AL., 98 Fed. 779.—A statute made loss of interest the penalty for usury, but provided that the contract proper should be valid. A contract contained provision for fees in case of suit. *Held*, that such provision is enforceable, even though the contract be held usurious.

The distinguishing feature of this case is that the promise of an additional payment was not an absolute, but a conditional one. The institution of the suit was at the option of the defendant debtor, and the provision for the payment of fees in such event must be looked on as a collateral contract. This brings the case within the Supreme Court rule as stated in *Spain v. Hamilton*, 1 Wall. 626. The defendant relied on the divided opinion of a State tribunal. *Agency Co. v. Gillam*, 49 S. C. 350.

## BOOK REVIEWS.

**A Selection of Cases on Constitutional Law.** By Emlin McClain, A.M., LL.D.  
Little, Brown & Co., Boston. One vol., 1100 pp., cloth.

The text books and selections of cases already published as the "Student Series" are well and favorably known, and this new volume maintains the high standard of its predecessors. Dr. McClain has substantially followed the plan of arrangement adopted by Judge Cooley in his "Principles of Constitutional Law," so that this collection of cases will prove invaluable to teacher and student of that text book, but the cases cover the subject so completely that the text book may be dispensed with. One feature of the book which will especially commend itself to the student is the elimination from the report of all matters collateral to the point on which the case is cited, while the student is thus saved the task of reading long arguments on procedure jurisdiction, etc., enough is retained to show how the question decided arises from the facts, as well as enough of the opinion to enable him to follow clearly the reasoning of the court with regard to the facts. In this way the cases with which every student of Constitutional Law should be familiar, have been gathered in one volume. In addition to the cases the Federal Constitution has been reprinted and a table of contents and full index have been given.

**American Bankruptcy Report.** Edited by William Miller Collier. Vol. II,  
pp. 881. Sheep. Mathew Bender, Albany.

The second volume of this excellent series requires no words of commendation. The series supply a need which is particularly great at the present stage of the decisions under the Bankruptcy Act. This volume brings the cases down to October, 1899, and shows the same care in preparation as the earlier one.

# YALE LAW JOURNAL

---

Vol. IX.

JUNE, 1900.

No. 8

---

## ENGLISH SYSTEM OF REGISTRATION.\*

It has often been said that the whole of English law is anomalous, and if I dare utter such an opinion, it is because Englishmen themselves agree to it. English legislation is made out of local customs and, particular statutes which have never been codified, so that there is no lack of confusion about them. On the same subject there may be two principal laws to rely upon, and one of them may be of the twelfth century, whereas the other is of last year. Scarcely different is the case of land transfer,—and we must be prepared for this surprise before we attempt to study its rules. It is a familiar thing to you that landed property has kept, up to this century, certain of the feudal features of the past. Besides the *freehold* estates, requiring no kind of seizin when acquired by sale or inheritance, there still remain *copyhold* tenures which can only be transferred with the agreement of the lord of the manor, and these two kinds of property remain on a different line as regards registration. We may be very brief in what concerns copyholds, for they are actually dying away. Since the middle of this closing century copyhold enfranchisement has been an article on the programme of liberal politicians, and it is easy to understand. The lord of the manor having right to personal duties at each transfer, the owner never knew whether he would not be ruined out of the estate by a mere spirit of vexation on the part of the lord. If this lord was an old man, who made up his mind to troublesome settlements, and would contract with another old man as tenant for life, and with a third old man as

---

\* Printed by permission of Callaghan & Co., of Chicago, by whom the series of five Storrs lectures, of which this is one, is to be published.

tenant in tail, it might occur that the owner of the copyhold would be obliged to pay several times the private duties of succession. Besides this pecuniary inconvenience, copyholds had many others. The copyhold confers a durable right, but as this right is subject to the payment of a rent, this rent is no less durable than the right itself, and weighs as a perpetual charge on the property. Moreover, the copyholder is limited in his possession by various other incumbrances, such as prohibition from digging wells or mines, or subjection to all kinds of servitudes. The object of liberals has therefore been to enfranchise all those copyholds, in allowing the copyholder to redeem all these incumbrances by the payment of a definite sum to the lord of the manor. Statutes with that object have been passed in the years 1841, 1852 (15 and 16 Vict. Ch. 91) and 1887 (50 and 51 Vict. ch. 73). Official commissioners, forming the *Board of Copyhold and Tithe Commissioners*, have been appointed by those acts in order to estimate the amount of money which could represent the capital value of the rent and other incumbrances weighing on each copyhold whose redemption was pursued. These statutory measures have led to the enfranchisement of as many as 300 copyholds *per annum*. There still remain many. New ones are even now and then created. But it is true to say that copyholds are gradually moving back before the salutary invasion of freehold property. If this reform is of a serious economical and social interest, inasmuch as it realizes freedom of land, it has, and especially has had, some inconvenience as to methods of conveyancing. Copyholds were, up to these last years, the only properties escaping from the unfavorable mode of secrecy which was the rule in British transfers of land. This was the beneficial effect of the feudal survival. A copyhold requiring, to be acquired, a regular investiture from the lord of the manor, could not be secretly bought and sold as a simple freehold. The lord of the manor wishing to preserve his right, invested the copyholder by putting his name down in his books, and a formality known under the name of *surrender and admittance* took place at that moment. The vendor being deemed to surrender from the copyhold to which the purchaser was admitted, had to symbolize his resignation, by giving up to the lord, or more commonly to the lord's steward, some branch or leaf out of the estate, and this same object was at once presented to the purchaser as a proof of his election. It is said that, fiction being reduced to its most simple form, the copyholder is never presented with anything more than a pencil taken up from the steward's desk. But the important thing to notice is the fact of the purchaser's name being immediately

recorded. Here is the true and efficacious formality. It suffices to prevent the vendor from selling the same property several times consecutively to different persons, who all, except one, are necessarily to be ejected. And this guarantee is the main object of registration. So one would have truly regretted its disappearance, if fortunately, the freeholds themselves were not gradually submitting to the rule of publicity, which formerly had only been a fact of copyholds.

\* \* \* \* \*

It must be explained how, for such a long time, such practical people as the Englishmen could bear with a complete secrecy of all transactions relating to freeholds. One must not judge too severely the land laws which seem the most strange, before perfectly understanding the reason of their insufficiency. I have tried to find out those reasons, and this is the result of my investigation:

First—In the first place, one excellent reason for secrecy of transfers being of small avail, was the fact of the very few sales of land which occurred in England. This was partly due to the small number of freeholds existing in a country where land has been monopolized by the aristocracy. In France it is believed that there are nearly 800,000 sales of land per annum. But in England the landed proprietors are no more than 200,000, according to the estimation made in 1871 by the New Domesday book. So that it would have been necessary that each English proprietor should sell his estate four times in a year, for the inconvenience of secrecy of sale to be felt in England as strongly as in France. And not only such was not the case, but it is a fact that these few English proprietors contracted about land, much less than continental proprietors. There was the best reason for this, in the fact that most of the English freeholds are inalienable by virtue of remote agreements. No custom is more persisting than that of tying up land by settlements. In some cases the owner cannot sell the land at all. This occurs when he has only an *estate for life*. In other cases the owner has an *estate tail*, and then he may confer some of his rights, or all of them, to the heirs of his body, but he cannot contract with any one else. All these intricacies served not only to make registration nearly useless because of the few contracts relating to land; they also made it useless as being, in any case, a slighter guarantee than inalienability.



Second—A second reason for registration being superfluous in England proceeded from the absence of a regular system of real securities founded on land. I will explain in my fourth lecture the legal features of *hypothèques* as they are practiced in France. Such a kind of security does not exist in England, and, as its existence would have made registration indispensable, one cannot say whether the absence of registration has been the cause of absence of *hypothèques*, or whether the absence of *hypothèques* has been the cause of the absence of registration. One thing is sure, that now registration is established, as we will soon see, there is no more any good reason for *hypothèques* not to be practiced in England. When a debtor has been obliged to confer a real security to his creditor, his only resource has been, till now, to consent to a mortgage. By this covenant the creditor becomes proprietor of such extent of land as is agreed upon, and that land becomes for him, a true estate in fee simple, at least *at law* if not *in equity*. The debtor has only a right of redemption when he offers the money guaranteed by the granted property. Well, it is easy to understand that with such a system, hardly, if at all, better than that of Ancient Rome, the services of registration should not be appreciated. As *one* creditor only can be guaranteed, he cares very little about a system intended to preserve right of rank and priority between several creditors; and as that single creditor is in possession, or can at least, by any action of ejectment, get himself put into possession as soon as needed, he has no fear of the debtor mortgaging a property already mortgaged to some one else.

Third—To these reasons, so very unfavorable to registration, I must add a last one, not the least perhaps, that is to be found in the way all men connected with legal profession have been opposed to English law making any progress in the matter of registration. People whose only work and living was afforded by conveyancing, and who already found alienable estates to be very few, dreaded exceedingly the very idea of a reform which might make transfer of land a rapid, easy and not expensive thing. Their obstruction must be held responsible for all the arrears of legislation on our special subject.

\* \* \* \* \*

In spite of all these difficulties, there had to come a time when registration would win its victory. New events prepared its way. First, it must be noticed that a gradual work has been going on in order to convert the old inalienable tenures into estates in fee simple,

free from all incumbrances. We have already mentioned the redemption of copyholds. We must also mention a series of settled land acts, whose aim was to render alienable, under certain conditions, many of the tied up estates. Moreover, it must be said that small estates, which are those which change hands the most often, have got more and more numerous in late times. The allotment acts have caused the establishment of lots of small holdings, cut out from the commons by the County Councils, or by the sanitary authorities; and some important landlords, urged by the agricultural crisis, have cut up their large domains into smaller pieces which they could sell at a better price.

All this made the advantage of registration most desirable. The tenants of small holdings could not afford to pay the bills of conveyancing solicitors, and, as to the owners of large estates, they began to appreciate registration from the time that the falling down of prices, caused by the agricultural crisis, made money matters touch them closely. At the same time English legislators, who would have never been convinced by the examination of continental systems, proved to be impressed by the example of English colonies, and the success attained in Australia, and other British possessions by the Robert Torrens' act, made the people believe that one could, without any lack of patriotism, adopt and acclimate on the English soil, those same principles.

Three different laws have striven to get such a result; the Westbury act, in 1862 (25 and 26 Vict. ch. 53); Lord Cairn's act in 1875 (38 and 39 Vict. ch. 87), and the Land Transfer act of 1897, which has come into operation on the 1st of January, 1898 (60 and 61 Vict. ch. 65). This last act, alone, has truly worked its way to a full success.

For the first time, in 1830, the real property commissioners concluded that a general system of registration would be a desirable thing, but this motion had no effect, and all the bills proposed with the same were rejected. This was the fate of Sir John Campbell's bill in 1835, and of a government bill in 1853. When the Westbury act was at last passed in 1862, it hardly met its purpose, since its only principle was to *allow*—*note this word allow, which includes no kind of obligation, moral or legal*—proprietors to have their title registered. The application was to mention if an *indefeasible* or a not *indefeasible* title was begged for. In the first case, great complication of time and inquiry took place, and, in both cases, the expense and procedure were out of proportion with the benefit obtained. It must be noticed that all the ex-

pense and trouble undergone were unavoidable for those who applied for registration, whereas the benefit derived from the easiness with which the owner could sell over the registered property to another purchaser remained merely eventual. The result was that no more than thirty-two applications per annum were received at the land registry. After a few years of this discouraging practice a new effort was made, and it led to Lord Cairn's transfer act, in 1873. This time the procedure and expense were considerably simplified. It was no longer necessary in order to obtain a *possessory*—that is to say, not indefeasible title—to produce a title drawn up by a solicitor, whose wages had previously to be added to those of the registry. It was declared to be sufficient that the owner should state the simple fact that he was in possession, without any attempt of proving his right of property. He was recorded, on his declaration alone, as the registered possessor, and this registration gave him a right of priority he could oppose to any one who would claim rights derived from a title more recent than the registration. Moreover, the legal aid of limitation transformed, after the required lapse of time, that possessory title, into a qualified one. So that no one had any more a very serious interest to apply for an indefeasible title. Those who knew their right were beyond discussion, and who cared to enjoy the benefit of the law—asked only to be registered with a possessory title, and they were then able to profit by the reduced rates of the registry for any future transactions about their property. In the meanwhile, even before they could avail themselves of the effect of limitation, they were admitted, whenever they chose, to beg their possessory title to be changed to an absolute one, on the simple proof of their right, and such a change got all the more easier and less expensive, as the possessory title had been registered for a longer time. The economy of cost for contract, passed under Lord Cairn's act, is sufficiently shown by the following figures :

Value of the transaction.	Cost of the operation made by a solicitor.	Cost under Lord W. act.	Cost under Lord Cairn's act.
50 £	3 £	6 s. 6 d.	5 s.
100 £	3 £	12 s.	10 s.
200 £	5 £.	19 s.	15 s.
400 £	6 £	1 £ 5 s.	1 £
1000 £	19 £	3 £ 15 s.	3 £

And it must be noticed that the expense mentioned for the operation conducted by a conveyancing solicitor, is mentioned according

to the rates of the solicitors' remuneration act of 1881. It was much greater still before that time. And I must add, also, that the same costs applied only to transfers by sale. For transfers by donation the costs, under Lord Cairn's act, could be reduced by three-quarters.

As to the expenses of the first registration, I mean of the entry of the title on the books, there was and could be no scale of prices under Lord Cairn's act. The cost depended on the length and difficulty of the inquiry pursued to ascertain the merits of the applicants declaration. But it may be said that, for a possessory title, the costs were only half of those of an ordinary transfer, whereas, for an absolute title, they could reach a much higher sum. Nevertheless, it was quoted that, for a property worth 40,000 £, the cost of an absolute title had only been of 53 £, and for a property worth 700 £, it had only been of 5 £ 13 s. In spite of all these advantages, registration did not yet spread in the United Kingdom with a satisfactory speed. More than one deficiency still remained to be changed. For instance, it was a fault to allow possessory titles to be registered without the exact description of the estate. I do not speak of the *legal* description consisting in the proof of the ownership. This would have been superfluous for a possessory title. But I speak of the physical and geometrical description involving the exact and precise statement of the situation of the land and its boundaries. Without believing, though the fact seems to be true, that it often occurred that a purchaser could not succeed in finding the ground he had bought, we may say that many owners could not say where their estate exactly began and finished. The boundaries were only described by the indication of the neighbor's name, but this could not suffice, and caused a necessary amount of litigation, without speaking of the risks of *inclosure* practiced by one of the neighbors towards the other. But the registration acts were constrained by the absence of any accurate map of the land. English people do not have a title map of the kind of the French Cadester. Their best is the ordnance map kept in Southampton, and gradually brought up to date by the *ordnance survey*. One copy of that map is of one inch in the mile, another of five inches, and the better and last one of twenty-five inches in the mile. But the marks of these maps can never be claimed as authentic boundaries of any property.

But, besides this grievous and still persisting stain, the system of registration, as it was understood by the Westbury and Lord Cairn's acts, had two other inconveniences with which the last act we now have to speak of, has fortunately been able to deal. One of

these inconveniences was the absence of any compensation in case of eviction or error, and the other inconvenience was to be found in the optional character of registration. Registration can only be popular if it is admitted that the errors committed confer some right to compensation. But this principle, even when admitted, can undergo two different applications. It may be decided that any one who will have been clever enough to get himself registered of property belonging to another person, shall—unless he be convinced of forgery—be deemed the real owner of the registered estate. Under such a system the compensation funds are given to the man who has been deprived of his land by an error he could not prevent. We already know this system is the Australian one, and it is true to say the title registered with so complete an effect, is an *indefeasible* one. But it may also be decided that registration will not, when the true owner gets to be known, be any hindrance to a sincere claiming, and that the man who will have been obliged to surrender from a registered land, will only receive pecuniary compensation. In this case registration is said to confer not an *indefeasible* title, but a *guaranteed* one, the guarantee being in the fact, that by registration one is sure to keep, in the worst case, if not the land itself, at least its equal value in money.

This is the system enacted by the law of 1897, and we may consider it as providing a sufficient security for all landowners to find a serious benefit in registration. The 7th section of the act runs as follows: "When any error or omission is made in the register or " when any entry in the register is made or procured by or in pursuance of fraud or mistake, and the error, omission or entry is not " capable of rectification under the principal act, any person suffering loss thereby shall be entitled to be indemnified in the manner " in this act provided. *Provided that* where a registered disposition " would, if unregistered, be absolutely void, or where the effect of " such error, omission or entry would be to deprive a person of land " of which he is in possession, \* \* \* *the Register shall be rectified*, and the person suffering loss by the rectification shall be " entitled to the indemnity."

For the purpose of providing the indemnity which may in such cases be payable, section 21 of the act provides that an insurance fund will be raised in setting apart, every year, a variable portion of the receipts from fees taken in the land registry.

It is the Lord Chancellor and the treasury who determine the portion to be raised. If ever the insurance fund was not sufficient, the State would meet the deficiency.

It is to be added that these provisions for compensation have the merit of conciliating in some way the sympathy of solicitors, for the legal profession may still help those who have their titles registered to draw them up in such a perfect or skillful way that the owner will be sure to remain in possession instead of being entitled to a mere indemnity.

Thus has been very cleverly blown away one of the principal deficiencies of Lord Cairn's act. I hasten to say that the Land Transfer Act of 1897 has equally turned out the inconvenience arising from the optional character of registration. To be quite true, it must be said rather that the new act has substituted for the option of individuals, the option of counties. Registration has not been made compulsory throughout the whole Kingdom. It is only enacted that, by order in Council, the Queen may declare, "as respects any county or part of a county mentioned or defined in the order that \* \* \* registration of title is to be compulsory *on sale*." This last word requires notice. It shows that there always remains a new stage of progress to reach, even after an order in Council registration only gets compulsory for *sale*, and all the other kinds of transfer may remain unregistered.

\* \* \* \* \*

Such being, after forty years strain, the principles of registration in England, we can give a glance at the technical management of the matter.

There is only one registry for all England, and it is to the chief of that office, the *Registrar* by name, that all those who want their titles to be registered must apply. The Registrar examines the titles produced before him, and may, if not satisfied, require before entering them on his books, such further proofs as he may deem useful. He may even require evidence from third persons, and ask the applicant to declare by an *affidavit* that he conceals no other important writing. The only case when the Registrar may neglect such kind of information, is when the applicant's possession is confirmed by limitation. As other warranties, it is enacted that any fraud would expose its author to two years imprisonment and a fine of 500 £, and it is moreover allowed for any person having some interest to do so, to enter in the registry a caution against any kind of registration concerning a defined property.

Subject to these provisions, an application may be made for the registration of a leasehold as well as of a freehold. But the copyholds remain under the special system we have already described. Once he is registered, the applicant may receive, on

simple demand, a copy of his registered rights. This copy receives the name, according to cases, of land certificate, office copy of a registered lease, or certificate of charge. As these copies are issued by the Registry, and are no less authentic than the Registers themselves, it is easy for the owner to prove his rights to those with whom he may desire to contract, without sending them for information to the Land Registry. It is enacted that the certificate must be presented "on every entry in the register of a disposition by the registered proprietor of the land, or charge to which it relates, and on every registered transmission or rectification of the register, and a note of every such entry, transmission or rectification shall be officially endorsed on the certificate."

\* \* \* \* \*

And now, to have a full view of the system's mechanism, we need only inquire about the way the different rights of property are entered on the Registrar's books.

*1st. Transfers by Sale.*—"The transfer is completed by the registrar entering on the register the transferee as proprietor of the land transferred—and until such entry is made the transferor shall be deemed to remain proprietor of the land. (Act of 1875, sec. 29.) The same method is applied to *freehold or leasehold* land (same Act, sec. 34). From that moment the transferee is entitled, if an eviction took place, to the indemnity provided by the insurance fund. He therefore requires no other proof of the transferor's right, than the fact that he himself was registered. The land certificate given by the transferor to the transferee mentions all the charges which weigh on the land, so that the transferee is aware of the right that may be opposed to his. As, besides legal charges, landed properties are usually subject to traditional intricacies and other easements, it would be a complication for these intricacies to be mentioned on every land certificate, specially owing to the fact of the considerable amount of litigation which could arise from any omission or misunderstanding about the least of those charges. The law has therefore wisely provided that, unless the contrary be expressed on the register, all registered land shall "be deemed to be subject to certain liabilities," of which the Act of 1875 contains in its 18th section a complete list. Such are rights to *mines and minerals*, rights of *fishing and sporting*, rights of *common*, of *sheepwalk*, of *way and water*, as well as obligation to pay land tax, rent charge, etc. I must say that, in this list, certain charges, such as the right

of way and water, ought not to find their place. Those easements are too important a burden, and their indefinite character is too much variable, with one property and another. They ought to be mentioned and defined on the register. French and Prussian legislations have deemed so, and after some time the English law will get to understand the same.

*2d. Transfer by Inheritance.*—There is an important difference between the case of a transfer by sale and that of a transfer by inheritance. It may be enacted that so long as a sale is not registered, the purchaser acquires no right, but it would be hard to decide that a son will not inherit his father's property, so long as it is not registered in his name. To whom would the property belong in the meanwhile? It would be barbarous to have it confiscated by the State, and hardly less to allow some successible parent of lower rank to outstrip the very child of a deceased man in getting registered in his place. So the registration of titles acquired by inheritance, remains optional, and may be postponed till the heir requires to sell or dismember by quarter his author's estate. It is only decided that those who are entitled to any special charge on the inherited land may apply to the Register for it to be booked.

*3d. Mortgages.*—The mortgagee gets his title registered just as if he acquired the land by sale, but we already know that he receives, in place of the *land certificate*, which remains in the hands of the *mortgagor*, another kind of copy called *certificate of charge*. As the *mortgagee* has the right to sell the land, the purchaser with whom he contracts, requires to have a copy of his own. The registrar may deliver to him a new land certificate, notwithstanding the other copies which remain in the hands of both the mortgagee and the mortgagor. There is no inconvenience in the thing, as the mortgagor has only a certificate of charge, and as the mortgagee's land certificate bears the mention of the mortgage. It must be added that mortgages may be established as well without as with a power of sale (Act of 1875, sec. 22.)

*4th. Liability to Succession Duty.*—It is enacted by the Act of 1875 (sec. 13) that "on every application to register land the registrar shall inquire as to succession duty and estate duty," and "if it appears that the purchaser should be liable to the duty, notice of such liability shall be entered on the register." It is even enacted that a *bona fide* registered purchaser, for full consideration in money or money's worth, shall not be effected by the duty, unless so noted on the register. We must add that a tenant



for life may have his title registered, even if the reversioner or remainder man is not registered himself (Act of 1897, sec. 6). The last information received shows that forty to fifty properties are being placed on the register every day, and that the financial conclusions have been very fairly verified, so that the registry pays its way easily, whilst no misfortunes whatever have occurred. This makes us believe that the time of expansion into the provinces will soon come. But, up to now, the London County Council has been alone in begging for an order of the crown making registration compulsory in its area. Out of that county, registration depends on the land owners option, and this option does not yet prove favorable. It must be added that the rule of secrecy still receives exception in the three ridings of the County of York, where a system of registration established by Queen Anne has been renewed by two acts in 1884 and 1885, and two other exceptions are to be mentioned in Kingston upon Hull and in Bedford Level. These exceptions deserve notice inasmuch as they prove that the benefits of registration will burst out by themselves, even in the midst of the most contrary circumstances, and one may truly say that for England, as for so many other countries, the dawn of progress is nigh.

JACQUES DUMAS.

## SOME OBSERVATIONS ON THE STATUS OF CUBA.

The status of Cuba since the ratification of the Treaty of Paris is anomalous, and viewed as a whole it might be called unique, could this distinction be safely applied to any political condition.

I venture some observations upon several features of the situation, in the hope of making a contribution toward a right understanding of the position of Cuba and the responsibilities of the United States in its regard.

### I.

The first paragraph of Article First of the Treaty of Paris reads: "Spain relinquishes all claim of sovereignty over and title to Cuba." Here is a parting with territory by Spain, yet there is no cession, nor even a surrender in the sense of a transfer. At the end of the peace negotiations Spain did what, at their commencement, she protested could not be done—she abandoned Cuba, after vainly striving to induce the United States to accept it from her hands. But the island, though abandoned, did not become a derelict, being straightway occupied, although not annexed, by the United States.

In these circumstances Cuba remains as foreign to our domestic system as it was when under the dominion of Spain. It is not within the purview of the Constitution nor any law of the United States. It is not within the jurisdiction of Congress, which is the legislature of the United States and not of any other country. This limitation of congressional power is prescribed by the rule that the acts of a legislature have no force in foreign territory, except, of course, as they may be held to affect citizens abroad. This rule is sometimes stated in terms recognizing the inability of one state to depreciate the sovereignty of another by asserting jurisdiction in the latter's territory, and were this the whole reason for the rule there might be difficulty in applying it to Cuba, where there is no state to be depreciated. But the sufficient reason for the rule is that a legislature is positively without jurisdiction beyond the limits of the country in which it is sovereign.

The second paragraph of Article First of the Treaty of Paris reads: "And as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property."

In considering the nature and effect of this occupation from the standpoints of the different parties interested in Cuba we shall gain an approximate idea of the status of the island.

## II.

From the standpoint of the United States Cuba is a foreign country in our occupation and control.

The occupation is not beneficial to us as it would be, presumably, had we annexed the island. In fact, it is decidedly burdensome, a vexatious result of a costly war waged for the avowed purpose of freeing Cuba from Spain in order to turn it over to its own people. However this fact may be esteemed in foreign chancelleries, or in Cuba itself, it entitles the United States to assert, upon occasion, any right, privilege or immunity that enures to a disinterested occupant of territory as distinguished from a sovereign proprietor, and leaves them responsible only for the discharge of the specific obligations of the Treaty of Paris, and such duties, sufficiently onerous, as may be attached by international law to an occupation of this peculiar kind.

Our control over Cuba savors of the protectoral relation in important respects, yet it is not a protectorate, because, apart from uncivilized regions, the subject of this relation is a state of more or less substantial powers.

There is no state of Cuba, and we shall only add to the embarrassments of a sufficiently difficult problem by tolerating such fictions as an embryo state, or even an effective sovereignty in the Cuban people. It is true that there are in operation in the island municipal and provincial systems of government and a complete judicial system, all officered by Cubans, but these agencies do not emanate from a local sovereignty. They exist by the ordination or permission of the United States. To be short, whatever sovereignty there is in Cuba to-day is vested in the representatives of the United States who administer the Government of Cuba.

The Government of Cuba is, essentially, the President of the United States, the island being ruled by his subordinates who execute his orders, or their own, which he adopts if he does not revoke. It cannot be said that this government is organically independent of the United States, for the President enjoys his powers by virtue of his office, and in no respect either within or without the United States is that office separable from the Federal Government of which it is a co-ordinate branch. The Government of Cuba is rooted in Washington, not in Havana. It is an offshoot of the Executive Department of the United States projected into and holding its place in a foreign territory with the assent of Congress. Hence, although the island of Cuba is not within the jurisdiction of Congress, the Government of Cuba is subject to every power which the federal legislature is authorized to exert in regard to the Executive Department.

Whether Congress is competent to order this government to pass specific laws for the island, and thus legislate effectively for it through the medium of the Executive Department without bringing it technically within congressional jurisdiction, I do not discuss. The impropriety of this action should be a sufficient reason for avoiding it.

Our control over Cuba may be called "military" in view of its origin, the agencies by which it is chiefly managed, and its freedom from the restraints of municipal law, yet it is not properly identified with a military occupation of foreign territory contemplated by the laws of war. Our control should be, as it is, exerted less rigorously than a "military occupation," and in thus differentiating it I rely upon the persuasive ethics of international law which discourage the application of belligerent right to a peaceful country. And Cuba is at peace, though prudence may forbid at present the diminution of our forces, and if need be the government may be called upon to display full military powers in the face of insurrection. I say "insurrection" advisedly, because at the moment our government was established in Cuba it rightfully demanded the obedience of the people.

While our control is less onerous than an ordinary military occupation, its activities are more varied and its responsibilities are heavier.

The conqueror's strict duty to the inhabitants of the territory is performed when he affords them such liberty of action

and protection as the exigencies of honorable warfare permit. Our duty in Cuba is to govern a friendly country. And this brings us to the grave question as to the powers of our government over the lives and fortunes of the people.

The fourth clause of the Joint Resolution of Congress, April 20, 1898, reads: "The United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said island except for the pacification thereof, and asserts its determination when that is accomplished to leave the government and control of the island to its people," and this was incorporated in the ultimatum delivered to Spain. "Pacification" is the master-word of the first part of the clause, and did this express a self-imposed law, we have broken it, for after stretching the word to the uttermost many of our acts in Cuba are hopelessly beyond its meaning. For example, the pacification of Cuba is not promoted by orders regulating the sponge fishery,<sup>1</sup> and prescribing that civil marriages only shall be legally valid.<sup>2</sup> The truth is "pacification" did not prefigure the great responsibilities and the sequent powers of the United States in taking charge of Cuba, and so far from breaking faith by assuming temporarily complete control they have performed a duty necessitated by the absence of a local government.

The Government of Cuba is not bound by any law of the United States in its dealings with the people, nor by any law of the old régime which it may choose to alter or repeal. Yet, although it is not restrained by a municipal constitution of which the governed may take advantage, I should hesitate to define this government as despotic in theory, not merely for sentimental reasons, but rather because it is required by principle as well as by treaty to respect the dictates of international law.

The government, however defined, is charged with the duty of administering Cuba and abating the grosser evils of the Spanish régime. And doubtless there is a field for remedial action beyond these imperative duties. But zeal for reform, a preference for the American way, which we understand over the Spanish way which we do not understand, should not lead to disturbances of fundamental law and inveterate custom unbecoming the office of a provisional ruler.

---

<sup>1</sup> General Brooke's Civil Report I, 109.

<sup>2</sup> Id. 44.

Our occupation is terminable at our discretion; and within our power is the method of ending it, though the brutal way of abandonment is practically out of the question.

The United States may end the present occupation by changing its character to sovereign proprietorship—by annexing the island. This can be accomplished only by Congress; the treaty making body, which usually enlarges the United States, being without jurisdiction in this case because there is no other government competent to make a cession.

Annexation by formal act would be the orderly course, but might not the same result be reached by Congress legislating for the island? We are so accustomed to enlarge our dominion by formal consent of the titular sovereign of the desired territory that we are apt to lose sight of the truth that land may be annexed as well by the actual assumption of jurisdiction by the President and Congress as by a treaty of cession. Said the Supreme Court, "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."<sup>3</sup> And Chief Justice Marshall said: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own courts that this construction is to be denied. A question like this respecting the boundaries of nations, is, as has been truly said, more a political than a legal question, and in its discussion, the courts of every country must respect the pronounced will of the legislature."<sup>4</sup>

The principle of Marshall's opinion covers a broader field than the disputed boundaries of land ceded by treaty, which was the case in *Foster v. Neilson*. If the army of the United States seizes foreign land; if a treaty of peace does not mention hostile territory then occupied by our forces, thereby recogniz-

---

<sup>3</sup>*Jones v. U. S.*, 131 U. S. 202, 212.

<sup>4</sup>*Foster v. Neilson*, 2 Peters 253, 309, cited in *U. S. v. Lynde*, 11 Wallace 632, 638.

ing our possession by the operation of the principle of *uti possidetis*; if American officers take possession of unoccupied land in the name of the Republic, Congress, by legislating for these territories, may effect their incorporation in the United States. Now Congress is at present without jurisdiction in Cuba, but the island is in possession of our forces. If, then, Congress shall choose to make laws for Cuba, the legislative and executive departments of our government will have asserted the perfect sovereignty of the United States, and the courts will follow their lead, provided the assertion be unequivocal.

Of course our courts would not recognize a statute of doubtful range as extending to Cuba. They would endeavor to construe a statute evidently intended to be operative in the island as an exertion of extraterritorial power over our citizens abroad, and not a law of the place. And, though this suggests a most delicate question, it is possible that a statute plainly directed to Cuba might be so trivial in itself or so markedly at variance with the pronounced attitude of Congress that the court would properly treat it as *ultra vires* rather than infer the tremendous consequence of an enlargement of the United States from such doubtful evidence of intention.

The method by which the United States are pledged to end their occupation of Cuba is to recognize a Cuban state. It is predicted that the pledge will be broken, or falsely kept by setting up a toy state that will cede the island to us in due form. Of these political forecasts I have only to say, at present, that I have yet to see the reason why the pledge should not be kept, and refuse to believe that the United States will play an hypocritical trick to gain an end which, if improper, should not be pursued, and, if proper, should be gained by the straightforward method of annexation by act of Congress.

### III.

From the Cuban standpoint the island is in a singular position. Severed from Spain; not joined to the United States; not the territory of a Cuban state; Cuba is in some sense merely a region administered by a foreign master.

Yet although the island is not the seat of a state it possesses a marked characteristic of an organized society—a body of law: Spanish in origin, yet retaining its vitality after the withdrawal of Spain; alterable by the government we have established, yet never becoming United States law, this body is the law of the

place, and the fact of its existence makes Cuba to some extent a political entity. To this law of the place, both civil and criminal, all persons in Cuba are subject, including all foreigners excepting our citizens whose connection with the army may subject them to the military laws of the United States.

What is the status of the people of Cuba, including in this class the Peninsular subjects of Spain who have not elected to retain Spanish citizenship in conformity with the provision of the Treaty of Paris?

On April 20, 1898, Congress resolved "that the people of Cuba are, and of right ought to be, free and independent." In point of law, this resolution had no more effect in Cuba than a resolution "that the Sultan of Morocco has and ought to have but one wife" would have in his palace. In point of fact, the resolution, so far as it dealt with the existing order of things, did not express a truth at the date of its passage—indeed, in the same breath Congress practically resolved to go war with Spain because the Cubans were not free and independent. Nor are they free and independent to-day.

The Cubans are no longer subjects of Spain. Divested of Spanish nationality, by their own consent in the case of Peninsulars who have cast their lot with Cuba, by the act of Spain in the case of Cuban-born subjects who were not given a right of election, they can be reintegrated only by complying with the provisions of Spanish law. The situation of men of Cuban birth who prefer Spanish citizenship is indeed a hard one, yet they cannot question the legality of the rupture of the old allegiance, for with the right of a sovereign to cede territory is coupled the right to disavow further responsibility for its inhabitants.

The Cubans are not, of course, citizens of the United States, nor are they technically our subjects, though if they can be said to owe allegiance to any political head it is to the government we have set over them. They have been called "citizens of Cuba," and so long as we understand their citizenship to be of that singular kind that does not involve membership in the political society we call a state, we may accept this classification, which seems to be approved by the Treaty of Paris. The Ninth Article declares that if the Peninsular subjects of Spain residing in ceded or relinquished territories shall not within a certain time declare an intention to retain their allegiance, "they shall be held to have renounced it, and to have adopted the nationality of the territory in which they may reside." "Nationality" is



evidently used in a political sense, and in order to give effect to this meaning in Porto Rico and the Philippines we must assume that the persons mentioned adopt the nationality of the United States, because as the United States have annexed these islands it would be as absurd to speak of Porto Rican or Philippine nationality as of Alaskan or New Mexican nationality. But as the United States have not annexed Cuba we can give effect to the provision in its regard only by accepting the theory of a Cuban nationality for what it is worth.

A familiar principle of public law is that a radical change of government, however it may alter the public order of things, shall, of itself, affect private relations and rights as little as possible.

The application of this principle to the domestic affairs of Cuba does not call for special consideration. It is sufficient to observe that rights vested under the old laws are not to be abrogated; that the old laws themselves endure unless they are altered by the provisional government; and that the people must receive from this government protection to person and property. Beyond these domestic affairs there are interests growing out of the intercourse between Cuba and the world at large, and to these the principle should be applied wherever practicable.

Cuba is still within the domain of private international law, and I assume that the courts of foreign nations, including, of course, our own, will generally continue to apply their rules in international controversies, involving contracts, wills, marriages and the like, as though the island had not undergone a political change.

Whether a foreigner may sue a person in the courts of the latter's country depends upon the local law, and it will be assumed that foreign courts heretofore open to Cuban subjects of Spain will not be closed to Cuban protégés of the United States. It is especially important that Cubans shall not lose any privileges in American courts because the United States have placed them in an anomalous position, and where proof of alienage is sufficient to confer jurisdiction there will be no question as to the propriety of entertaining their suits, for unquestionably they are aliens. Because the right to sue is accorded "to citizens or subjects of a foreign state," by the Constitution of the United States, an effort has been made to bar Cubans from the federal courts, but Judge Lacombe has decided in their favor, saying of the defendant's contention:

"There is certainly nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen. Even the brief memorandum of opinion in *Stuart v. City of Easton* (156 U. S. 46), gives no support to demurrant's contention. One may be puzzled to determine upon what theory it was held in that case that a "citizen of London, England," is not a "foreign citizen;" but assuming, as suggested, that it is because London is not a free and independent community, but owes allegiance to the British Crown, the decision has no application to the case at bar, since the political branch of this government has found as a political fact that the people of the island of Cuba "are free and independent."<sup>1</sup> May not Judge Lacombe's conclusion be upheld without lending judicial sanction to the fiction of Cuban independence? Even if we attribute to Cubans a sort of citizenship they are neither citizens nor subjects of a "foreign state," for there is no 'state' of Cuba, and the government we have established is not "foreign." As the letter of the Constitution must be departed from to some extent to effectuate its meaning, why should not the provision be interpreted, as a whole, in the broad spirit which animates it, and the courts be declared open to persons who show that they are not citizens of the United States?

Besides international controversies determinable in the courts, there are private interests recognized by the law and custom of nations as being the proper subjects of diplomatic assistance or negotiation, and for which individuals may request the good offices of their government. Regarding the common protection and privileges to which persons in foreign countries are entitled by international law, the diplomatic and consular offices of the United States may be exerted in behalf of Cubans as nearly to the extent of their exertion for our own citizens as the rules of foreign governments and our own permit.

Generally speaking, our concern for Cubans abroad cannot be properly questioned by a foreign government, for these reasons: Because the relation between a state and a person for whom it claims protection is no concern of a foreign state unless it claims him as its own citizen, and we shall not meet this embarrassment because Spain has completely denationalized her Cuban subjects: Because as foreign governments are entitled, as we shall see, to view the United States as the pro-

---

<sup>1</sup> *Betancourt v. Mutual Reserve Fund Life Association*, N. Y. Law Journal, May 15, 1900.

tector of the interests of their subjects in the island, they will not disavow the reciprocal duty of safeguarding Cuban interests in their own dominions.

The fact that Cubans cannot receive United States passports, which are issuable to citizens only, is not especially detrimental. The State Department has approved the issuance of the following consular certificate to an American Indian: "The bearer of this document is a North American Indian whose name is Hampa. This Indian is a ward of the United States, and is entitled to the protection of its consular and other officials. He is not, however, entitled to a passport, as he is not a citizen of the United States. This consulate has the honor to request the Russian authorities to grant Hampa all necessary protection during his stay in Russia, and grant him permission to depart when he requires it."\* The State Department may issue suitable certificates to Cubans—probably it has already done so—and these will be honored abroad as our Indian certificate seems to have been, and as the passports issued by Great Britain and France to persons not their citizens, but within their protection, are honored.

Whatever rights under Spanish treaties Cubans may have enjoyed abroad as Spanish subjects have been lost by the severance of Cuba from Spain. Whatever rights may be secured to them by the treaty of Paris are enforceable by the United States, at least during the term of their control. Whether the United States shall be disposed to request and be able to secure for Cubans the benefit of treaty rights in foreign lands enjoyed by their own citizens depends upon the nature of the particular right in question. There is no doubt that the benefit of our consular jurisdiction in non-Christian countries should be claimed for Cubans. On the other hand, it would be absurd for the United States to demand for them the fishing rights on the Northeast coast secured to the people or citizens of the United States by treaty with Great Britain.

#### IV.

The distinction between Cuba and the United States which we maintain as a matter of domestic law and polity is not altogether effective from the standpoint of foreign nations.

When a region is occupied by a foreign state, other states are not necessarily affected by the motive of the occupation, so far as their current intercourse is concerned, and, in their reasonable demand for a visible and responsible head to a

---

\* Hunt's *The American Passport*, p 147

country with which they deal, are entitled to treat the occupant as the sovereign for certain purposes. And it is the interest as well as the duty of the occupant to accept the proper responsibilities of the position, because if these be disavowed the country may be left without a government, and in this event a foreign state being unable to protect its lawful interests by negotiation, may at once employ adequate force.

From the standpoint of foreign nations Cuba is in some sense part of the United States, and the United States accept this conclusion of international law.

According to the first article of the Treaty of Paris already cited, "the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation, for the protection of life and property." While this clause is part of a treaty with Spain, and does not import an agreement with any other nation, it is really but the acknowledgment of an independent obligation to all nations. And it may prove to be an inadequate acknowledgment, for if, perchance, there be any international duty not included in "the protection of life and property," the United States cannot honorably avoid the consequences of a breach of it by referring to the treaty as the measure of their responsibility.

In considering our duties to foreign nations in regard to Cuba we must first differentiate Spain from the generality in regard to the special agreements made with her in the Treaty of Paris. Apart from the law of the Treaty of Paris, by which Spain is particularly bound and benefited, she stands with the other nations in respect of international rights and obligations.

The foreign responsibilities cast upon an occupant in the case of occupation of hostile territory during war, when inevitable disorder may excuse unavoidable defaults, and when the ousted sovereign has still a legal title to the country, and may regain possession by reconquest or treaty, are broader and heavier in Cuba, where order reigns if not contentment, and whence the old sovereign has departed leaving the representatives of the United States in full control.

Without attempting to forecast the possible reclamations that may be made against the United States on Cuban account, it should be understood by the Cubans that if the United States

become liable for a pecuniary indemnity they will place the real burden where it belongs. If the injury be caused by the unlawful act or omission of United States citizens, the indemnity should be charged upon the Federal Treasury. On the other hand an indemnity due on account of the acts of Cubans should be charged to Cuba, and paid either out of insular revenues, or by Cuban obligations which the United States should guarantee to the creditor and enforce against the debtor.

CARMAN F. RANDOLPH.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,  
ROBERT H. GOULD,  
LESLIE E. HUBBARD,

WARREN B. JOHNSON,  
ARCHIBALD W. POWELL,  
GEORGE ZAHM.

## Associate Editors:

M. TOSCAN BENNETT,  
JOHN HILLARD,  
WILLIAM H. JACKSON,  
CORNELIUS P. KITCHEL,

GEORGE A. MARVIN,  
ROBERT L. MUNGER,  
HENRY H. TOWNSHEND,  
THOMAS J. WALLACE, JR.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

## STATE REGULATION—PROPERTY IN OIL AND NATURAL GAS.

As illustrating how far a State can go in protecting rights of the public at the expense of individuals, and in marking out the peculiar nature of property rights in oil and natural gas, *Ohio Oil Co. v. Indiana*, 20 Sup. Ct. Rep. 526, is an important case. It was held that a statute prohibiting the free escape of gas or oil, was not a taking of private property within the 14th amendment, although the Oil Company was interested solely in getting oil, and to do so with profit, it was necessary to permit the gas to escape.

Natural gas and oil are practically minerals *feræ naturæ*, and until reduction to physical possession the surface owners have no actual property therein; merely the right to reduce. *Brown v. Vandegrift*, 80 Penn. St. 142; *People's Gas Co. v. Tyner*, 131 Ind. 271. But the analogy is not complete, for then the right being in the public, could be withheld. *Greer v. Connecticut*, 161 U. S. 519. Consequently there being no property, there could be no taking without due process as claimed. The fact that the company, engaged solely in extracting oil, suffers a hardship, goes to the wisdom and not the power of the Legislature, in passing such an act.

The importance of the object sought after—the preservation of a source of great wealth—seems to amply justify such legislation, as courts have held waste by one surface owner did not give an action to another suffering loss thereby. *Hague v. Wheeler*, 157 Penn. St. 324; *Jones v. Forest Oil Co.*, 44 Atl. Rep. 1074; the State ought to have the power by legislation to curb indiscriminate waste which might involve the loss of entire oil and gas deposits.

ASSOCIATED PRESS—DUTY TO PUBLIC—ILLEGAL CONDITIONS.

The recent case of the *Inter-Ocean Pub. Co. v. Associated Press Co.*, 56 N. W., Rep. 822, makes a new application of the law of monopolies which is of great importance. The *Inter-Ocean* was a member of the Associated Press Co., under contract to receive its news upon condition that it was neither to furnish nor receive news from outside companies deemed antagonistic. It violated its covenant by receiving from the Sun Printing and Publishing Co. news which the Associated Press was unable to furnish. By its agreement this rendered it liable to suspension from the Associated Press. An injunction is granted to prevent this, on the ground that the business of the Associated Press is impressed with a public interest, and must be carried on without discrimination, and that the provision in its by-laws requiring the exclusive use of its news as a condition of membership is void, as tending to create a monopoly.

This puts associations for collecting and vending news upon a plane with common carriers, telephone and telegraph companies as to their duty to treat all impartially; and news is deemed a commodity of public necessity which, like coal, gas, water, etc., it is illegal to monopolize. The justice and logic of this view can hardly be denied and is well supported by authority. A board of trade cannot withhold market quotations after a compliance with reasonable rules. *N. Y. & Chicago Exchange v. Chicago Board of Trade*, 127 Ill. 153. And telegraph and telephone companies must serve indiscriminately, their duty to the public being superior to any contract which they may have with an owner, whose patent they use. *Com. Union Tel. Co. v. N. E. Teleg. & Telp. Co.*, 6 Vt. 241; *Chesapeake Co. v. B. O. Tel. Co.*, 66 Md. 399; though this is denied in *Amer. Tel. Co. v. Conn. Tel. Co.*, 49 Conn. 352.

The duty of the Associated Press to the public is paramount to the rights it had under contract against the *Inter-Ocean*, and a provision compelling the exclusive use of its news is there-

fore against public policy and void. It undoubtedly tends to create a monopoly and gives to its possessor the power to dictate what news the public shall receive, regardless of what it ought to have. This is a power too dangerous and vital to be above public control, and is not such a reasonable regulation as all quasi-public corporations have the right to prescribe. *Smith v. Tel. Co.*, 42 Hun. 454. Nevertheless, a similar restriction was held good in New York on the ground that a coöperative society had the right to make rules governing its members.

Had the court decided in the present case that such was a reasonable regulation as only a partial restraint of trade, it might then have presented the interesting Federal question as to whether it would not come under the Anti-Trust Act of 1890, declaring combinations in restraint of interstate commerce void without regard to their reasonableness. From what Chief Justice Marshall said in *Gibbons v. Ogden*, 9 Wheat. 1, it might be that interstate news which is bought and sold is included within interstate commerce.

#### TRUSTS—PRACTICAL OPERATION OF THE REMEDY ADOPTED BY TEXAS.

The amount of discussion and divergence of opinion expressed in recent magazine publications, more than any complication of legal principles involved, induces us to review the recent decision of the Federal Supreme Court in the case of *Waters-Pierce Oil Co. v. State of Texas*, 20 Sup. Ct. Rep. 518, in which proceeding the defendant company has been forbidden doing business in the State of Texas, being held to have violated certain provisions of the Texas anti-trust law, and thereby having forfeited its license. The principles of law announced are extremely important, though they seem quite well settled.

The usual law exists in Texas (Acts of 1889, p. 87) whereby a foreign corporation, upon filing a certified copy of its articles of incorporation with the Secretary of State, secures a licence to do business in the State. The *Waters-Pierce Oil Co.*, complying with these provisions, obtained such a license for a period of ten years, and engaged in active business. Subsequent to the issuance of this license an anti-trust law was passed, and this proceeding was brought against the plaintiff in error, alleging a violation of this law, and praying that its license be revoked.

It is clear, construing the statute according to the interpretation given it by the Texas courts, that no question of interstate commerce is involved; commerce consisting in the trans-



portation of commodities, and not in their sale. *Ex parte Kochlier*, 30 Fed. Rep. 869. And as the construction placed upon a State statute by the courts of the State is held in the present case not open to review by the Federal Courts, inquiry into the interpretation of the statute, its construction and the question of interstate commerce are summarily disposed of. *Tullis v. L. E. & W. R. R. Co.*, 275 U. S. 348; *R. R. v. Paul*, 173 U. S. 404.

The really serious question involved is this: "Can a State license a foreign corporation to do business within its limits, and after money, time and labor are expended by the company, in good faith, pass such legislation, after the granting of the license, as will produce such a result as that involved in the present case? The consideration of this proposition is not indispensable to a review of the case, as at the time the license was issued to the Waters-Pierce Oil Co. an anti-trust law existed, which was as much violated by the company as the one subsequently passed was; but we consider the question, for the reason that it has been so persistently discussed in connection with the present case. A license issued to a foreign corporation for valuable consideration, even though construed as a contract, is always subject to such reasonable violation, at the hands of the State, as a proper exercise of the police power may effect. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Stone v. Mississippi*, 101 U. S. 814. A State cannot by any grant estop itself from a free and unrestricted exercise of its police power. *Beer Co. v. Mass.*, 97 U. S., 25, and the passage of an anti-trust law is held to be such an exercise of this power. *Munn et al. v. State of Ills.*, 94 U. S. 77. Hence the passage of an anti-trust law affecting the rights held by a foreign corporation under a license previously granted is valid.

And further, the law seems clear to the effect that the word citizen as used in the Federal Constitution, § 2, Art. IV, and in the XIV amendment does not apply to corporations, hence the plea respecting equal privileges and immunities is of no avail. *Paul v. Virginia*, 8 Wall. 168, *Pembina Co. v. Pennsylvania*, 125 U. S. 181. The great questions involved in this case are comparatively free from controversy among the authorities. The surprise manifested in current publications at the decision arises chiefly for the reason that exactly such facts have not occurred before to which our supreme tribunal could apply the well established rules of law.

## RECENT CASES.

**APPEAL—SERVING "CASE"—CITY OF GARDEN CITY v. MERCHANTS' AND FARMERS' NATIONAL BANK OF DANSVILLE, N. Y., 60 Fed. (Kan.) 823.**—The records of the lower court show that after the judgment had been rendered the court extended the time of the defendant for making and serving a case to the 22d day of March, 1897. On the 22d further extension was made. Defendant claims that the case made was not served within the time fixed by order of the lower court. *Held*, that a time for serving such "case" expired March 21, at midnight, and a case served under an order made March 22 would not be served in time.

*In King v. Stevens & Agnew*, 5 East 244, Lord Ellenborough said "that the words 'to and until' may be either inclusive or exclusive, according to the manifest intention of the persons using them." The cases of *Montgomery v. Reed*, 69 Me. 514; *Thomas v. Hatch*, 3 Sumn. 178, 179, and *De Haven v. De Haven*, 49 Ind. 206, hold that the word "to" is exclusive, while *Gottlieb v. The Fred. W. Wolf Co.*, 75 Md. 126, a case in many respects parallel to the present case, holds that the word "to" is inclusive. In the cases of *Bellhouse v. Miller*, 4 Hurl. & Nor. 120; *Isaac v. Royal Ins. Co. L. R.*, 5 Exch. 296, and *Thomas v. Douglas*, 2 Johns Cases 225, hold that the word "until," which is synonymous with "to," is inclusive.

**ARREST—JUSTIFICATION—FALSE IMPRISONMENT—SNEAD v. BONNOIL, 63 N. Y. Sup. 553.**—Officers, suspecting felony, made an arrest without a warrant and found a concealed weapon in possession of the party, for which misdemeanor he was subsequently fined. Failing to get proof of felony, they charged the plaintiff with carrying concealed weapon after he had been in jail 24 hours beyond the time when he was entitled to discharge upon bail, had they made such charge at once. *Held*, false imprisonment. Van Brunt, P. J., and Ingraham, J., dissenting.

As to justification for arrest in that a concealed weapon was found, the majority opinion follows *Murphy v. Kron*, 8 N. Y. St. R. 230. "You cannot arrest a man merely because, if all were known, he would be arrestable." Even admitting justification, they held that, owing to the said 24 hours' over-time, the case was within the rule laid down in the *Six Carpenters' Case*. 8 Coke 146, thus deeming the officers trespassers ab initio. The dissenting judges held that the detention was not wholly illegal and that an arrest made by an officer without a warrant for a misdemeanor committed in his presence is not a false imprisonment. 12 *Am and Eng. Ency.* 726, 740; *Meserve v. Folsom*, 20 Atl. 926. They contended also that it was against public policy thus to hamper the police in the exercise of their discretion.

**ATTORNEY AND CLIENT—LIEN—WEATHERFORD v. HILL ET AL., 56 S. W. Rep. 448.**—Claim for attorney's lien on land assigned as dower. *Held*, where attorney obtains partition of land he acquires no lien for his fees on the part set aside for his client. Bunn, C. J., dissenting.

This ruling is in strict conformity with the decisions contained in *Hershey v. Deo. Val.*, 47 Ark. 86; *Gilson v. Buckner*, 44 S. W. 1034. Nevertheless, in *Brown v. Biddle*, 3 Tenn. Ch. 618; *Wilson v. Wright*, 72 Ga. 848, the lien was recognized. It was also extended in England by 23 and 24 Vict., ch. 127 and 128.

**BILLS AND NOTES—IRREGULAR INDORSEMENT—CARRINGTON v. ODOM, 27 Sou. Rep. 510 (Ala.).**—Where defendant endorsed a promissory note before

delivery. *Held*, he is subjected to only the obligations of an endorsee, unless it is shown by oral evidence (which is held admissible) that he executed it as maker.

The authorities are hopelessly at variance on the question of anomalous indorsements; some courts holding such an endorser a joint promisor or surety. *McGuire v. Bosworth*, 1 La Ann 248. Pennsylvania regarding liens as a guarantor. *Schollenberger v. Nelis*, 28 Pa. St. 189. The Connecticut court holds in *Perkins v. Catlin*, 11 Conn. 213, that the nature of the indorsement is to be proved by oral evidence, while in *Wright v. Morse*, 9 Gray 337, the presumption that he intended to be an original promisor seems to be conclusive. The difficulty of carrying out the intention of the parties and at the same time preserving the certainty and exactness of commercial instruments, possibly accounts for the conflict among the courts.

CONSTITUTIONAL LAW—BANKRUPTCY—ALIMONY—BARCLAY V. BARCLAY, 56 N. E. 636.—Plaintiff in error brings record to the Supreme Court claiming that proceedings, resulting in a decree of alimony, should have been stayed in Circuit Court until adjudication on a bankruptcy petition, and also claiming that Section 12 of Article II of the Constitution: "No person shall be imprisoned for debt, etc.," has been violated. *Held*, that there was no error committed by the Circuit Court.

The question as to whether alimony is a "debt" within the meaning of a statute providing for relief from such debts by a discharge in bankruptcy, seems to be undecided. A decree for alimony and costs is a provable debt under Bankrupt Act of 1898. *In re Van Orden*, 96 Fed. 86. Alimony is not a debt. *Noyes v. Hubbard*, 15 L. R. A. 394. Nor is it a "debt" within the constitutional inhibition of imprisonment for debt, and the defendant may be held to answer for contempt in default of payment. *Pain v. Pain*, 80 N. Car. 322; *Chase v. Ingalls*, 97 Mass. 524. Failure to pay alimony as directed by order of court is no ground for imprisonment. *Wightman v. Wightman*, 45 Ill. 167; *Steller v. Steller*, 25 Mich. 159.

CONSTITUTIONAL LAW—DENTISTRY—EXAMINATIONS—KNOWLES V. STATE, 45 Atlan. 877 (Md.).—By a legislative act all persons wishing to practice dentistry in Maryland were required to pass an examination given by a State board of examiners. By a clause in the act the board was allowed to waive the examination at its discretion. *Held*, that such an act was constitutional.

As to the constitutional right of a State to require examinations of this kind there can be no doubt. *Dent v. W. Va.*, 129 N. S. 114; *Singer v. State*, 72 Ind. 464. The point of controversy in the case was whether the right to waive the examination by the board was not conferring upon it unreasonable and arbitrary power, thus making it come under the decision as laid down in *Yick Wo v. Hopkins*, 118 U. S. 356. The court reached its decision on the idea that the spirit and principle upon which the act was passed precluded any limit of purely personal and arbitrary power. *Williams v. State Board*, 93 Penn. 619; *State v. Creditor*, 44 Kan. 568.

CORPORATIONS—PROMOTERS—ATTORNEY AND CLIENT—FREEMAN IMP. CO. V. OSBORN, 60 Pac. Rep. 730 (Colo.).—Where an attorney rendered services to the promoter of a corporation, drawing articles of association, by-laws, etc. *Held*, the charge is an indebtedness of the corporation when it comes into existence. *Bell's Gas Co. v. Christie*, 79 Pa. St. 54; *Law v. Connecticut, etc., Ry. Co.*, 45 N. H. 370. *Contra*, *Gent v. Manufacturer's Ins. Co.*, 107 Ill. 652.

CORPORATE STOCK—DAMAGES—EVIDENCE—MARKET QUOTATIONS—SALES—WILDES ET AL. V. ROBINSON, 63 N. Y. Sup. 811 (App. Div.).—In an action to recover damages for failure to deliver stock according to contract, evidence as to market quotations on said stock at a certain time was admitted to show its value. *Held*, inadmissible unless based on actual sales. New trial ordered. O'Brien and Ingraham, J. J., dissenting.

The court held that a mere bid in a distant market, without proof of attending circumstances, is not competent evidence as to value of the property in question. *Whitney v. Thacher*, 117 Mass. 527; *Hanna v. Sanford*, 20 W. Dig. 288. The proper measure of damages was the difference between the price agreed to be paid and the market value of the stock at the contracted date of delivery. Interest is sometimes added. *Gibbons v. U. S.*, 8 Wall 269; 5 *Am. & Eng. Ency.* 630. The dissenting judges held that in absence of other evidence a reference to a distant market is justified. *Gregory v. McDowal*, 8 Wend. 435; *Durst v. Burton*, 47 N. Y. 167. They also contended that a bid is a fair basis of estimation, as it is generally below actual value.

**DIVORCE—CRUELTY—HAIGHT v. HAIGHT**, 82 N. W. 443 (Iowa).—*Held*, frequent and false charges of adultery made against a wife by her husband constitute cruelty for which a divorce may be granted.

The earlier courts were loath to consider this sufficient ground. False charges of adultery and obscene epithets do not constitute cruelty sufficient for the granting of a divorce. *Shaw v. Shaw*, 17 Ct. 189; *Harding v. Harding*, 22 Md. 337. There has been a tendency to change, and now a false and malicious charge of adultery is generally held sufficient cruelty. *Am. Eng. Ency. of Law* (2d ed.), 9-797, and cases cited there.

**DIVORCE—DEATH OF PARTY—BEGBIE v. BEGBIE**, 60 Pac. Rep. (Cal.) 667.—Where defendant in a divorce proceeding died after the rendering of a decree of divorce in the trial court and before a hearing in the appellate court (an appeal having been granted). *Held*, the action abated, and the relation of husband and wife with the property rights incident thereto was severed, and no review could be had. *Kirchner v. Dietrich*, 110 Cal. 502; *Barney v. Barney*, 14 Ia. 189. But see *Donner v. Howard*, 44 Wis. 82, which intimates that upon death of either party pending an appeal from a judgment granting a divorce, the appeal *would be reviewed* for purpose of protecting persons whose property interests were affected by the judgment.

**ELECTRICITY—ACTION FOR CAUSING DEATH—FAILURE TO INSULATE WIRES—THOMAS, ADMINISTRATOR, v. MARYSVILLE GAS CO.**, 56 S. W. 153 (Ky.).—The defendant supplied the wires of a street railway company with electricity. The railway company failed to properly insulate its wires, thus causing death of plaintiff's intestate. *Held*, the Gas Company could be held liable for damages. *Buchanan and DuRella, J. J.*, dissenting.

This is one of the first cases in which this exact question has been decided. It would seem on principle that where an article was delivered to the vendee he would be liable for damages resulting from it. *Dixon v. Yales*, 2 Nev. & M. 202; *Foster v. Roper*, 111 Mass. 10. A person handling dangerous substances, however, does so at his peril. *Whart. Neg.* § 851, and thus the defendant in handling so dangerous a force as electricity, the nature of which is so little understood by the public, should have used more than ordinary care in seeing that the wires which they charged for the Railway Company were properly protected. *McLaughlin v. Electric Light Co.*, 100 Ky. 178.

**EXCESSIVE SENTENCE—HABEAS CORPUS—DE BARA v. U. S.**, 99 Fed. Rep. 942.—*Held*, upon habeas corpus proceedings, a sentence for a longer term than allowed by law was void only as to the excess, and discharge was refused. There are two rules, one considering the excessive sentence as an entirety and wholly void; the other holding only the excess void. The former was held in *Ex parte Kelly*, 65 Cal. 154; *Ex parte Page*, 49, Mo. 291; and *Ex parte Bernert*, 7 Pac. C. L. I. 460; the latter obtains in Alabama, Georgia, Kansas, Maine, Massachusetts, New York, West Virginia, Wisconsin, Virginia, and the Federal Courts. *Sennott's Case* 146 Mass. 489, *In re Graham*, 74 Wis. 450; *People v. Baker*, 89 N. Y. 460, and *Ex parte, Max.* 44 Cal. 579.

**FERRIES—ESTABLISHMENT BY A COMBINATION OF PERSONS FOR THEIR OWN BENEFIT—TANNER v. WARREN**, 56 S. W. 167 Ky. 1.—A number of persons combined and bought a boat for the convenience of themselves and their families in crossing a stream within the prohibited distance of an exclusive ferry privilege. *Held*, that there was a violation of the privilege, and an injunction would lie. Du Rella, J., dissenting.

It is difficult to see just where the courts draw the line as to what will constitute an infringement of a ferry privilege. The cases show that it is no infringement for a person to transport his own property in his own boat. *Alexandria, etc., Ferry Co. v. Wisch*, 73 Mo. 655; *Trent v. Cartersville Bridge Co.*, 11 Leigh (Va.) 521. One case, at least, hold that this right may be even extended to the transporting of employees, guests and friends. *Hunter v. Moore*, 44 Ark. 184. In the case stated the combination for the express purpose of avoiding the ferriage was undoubtedly the ground upon which the decision was based.

**FIRE INSURANCE—CONTRACT—POLICY—DELIVERY—PROOF OF LOSS—WAIVER—HICKS v. BRITISH AMERICA ASSUR. CO.**, 56 N. E. 743 (N. Y.).—A plaintiff's assignor had a conversation with defendant's local agent, and made a contract of present insurance for \$2,500 upon his property. Two days later said property was destroyed by fire, and before the standard policy was received. When notified of the loss, defendant's agent denied that a verbal contract was made, but the agreement was conclusively proved in court. Plaintiff suing on breach of contract, defendant holds that the verbal contract embraced the conditions of the standard policy of fire insurance, which states that a proof of loss must be shown within sixty days after the fire. Plaintiff admits that he neglected to do this, but claims that the suit being for breach of contract, such proof of loss is immaterial. *Held*, the failure of defendant's agent to issue a standard policy and his denial of the contract was not a waiver of defendant's right to the provisions of the policy requiring a proof of loss. Landon, Werner and Haight, J. J., dissenting.

In the cases of *Angell v. Insurance Co.*, 59 N. Y. 171, and *Ellis v. Insurance Co.*, 50 (N. Y.) 402, it was held that an agent had authority to make a verbal contract of insurance and that "recovery of the amount to be insured is proper, as damages for the breach of such contract." The court overrules these decisions on the ground that they were made before the Legislature had prescribed a standard policy of fire insurance in the State.

Judge Werner, in his dissenting opinion, contends that since the agent denied the verbal contract, plaintiff could regard it as rescinded and sue for breach. *Stokes v. Mackay*, 41 N. E. 496.

**GROWING CROPS—ATTACHING CREDITORS—CASE ON SHARES—CURTNER v. SYNDOW**, 60 PAC. REP. (Cal.) 462—Where rent for leased land was to be paid in a proportion of the crops, and the lessor assigned his interest in the growing crops to a third person. *Held*, as to the assignor's attaching creditors, the growing crops were personal property and title passed to assignee.

Much conflict of authority exists respecting the question of growing crops. *Tiedeman Real Prop.* § 201 holds the lessor in a cropping contract has no vested interest in the crop, as such; his title vesting only after apportionment and delivery, to the same effect. *Aiken v. Smith*, 21 Vt. 181; *Pickens v. Webster*, 31 La. Ann. 870, holds the uncut crops under such an agreement subject to the lessee's creditors; also does *Howard Co. v. Kyle*, 28 N. W. Rep. (Ia.) 609, and *Long v. Leavers*, 103 Pa. St. 517. In support of the present case see *Pope v. Hurtle*, 14 Cal. 403.

**HABEAS CORPUS—EXTRADITION—TREATY STIPULATIONS—COHN v. JONES**, 100. Fed. Rep. 639.—Plaintiff was extradited from Canada upon an information charging arson for the burning of a house, further described as in the occupa-

tion of a shoe company. In the treaty it was stipulated that there should be no liability for any but the offense surrendered for. The alleged house was in fact a store, the burning of which was statutory arson in Iowa, but not arson at all in Canada. *Held*, the action of the Canadian authorities in giving over the prisoner was conclusive and habeas corpus was refused.

**INDIANS—CAPACITY TO SUE—EJECTMENT—JOHNSON V. LONG ISLAND R. CO.,** 56 N. E. 992. (N. Y.).—Plaintiff, a member of the Montauk tribe of Indians, brought action in ejectment on behalf of himself and any members of the tribe who would come in and contribute to the expense. *Held*, that Indian tribes are wards of the State and generally speaking are possessed of only such rights to appear and litigate in courts of justice as are conferred on them by statute, Vann and Landon, J. J., dissent.

Where the jurisdiction depends on the subject matter of the controversy and not upon the status of the parties, the weight of authority seems to favor the right of an Indian to a standing in both the United States courts and the State courts. *Wiley v. Keokuk*, 6 Kan. 94; *Yick Wo v. Hopkins*, 118 U. S. 356; *Dred Scott v. Sandford*, 19 How. (U. S.) 403.

**INTERNAL REVENUE—STAMP TAX—BONDS OF SALOON KEEPERS—UNITED STATES V. OWENS**, District Court, E. D. Missouri, Fed. Rep. 160, Page 170.—The question presented by the demurrer to the information in this case is whether a dramshop keeper's bond, given pursuant to the provisions of the State of Missouri, is subject to the stamp tax of 50 cents imposed by the war revenue act of 1898 (*Inter Alia*) upon all "Bonds of any description, except such as may be required in legal proceedings not otherwise provided for in this section."

*Held*, that a bond given by a saloon keeper, as one of the conditions of the granting by the State of a license, is an instrumentality employed by the State to execute and enforce its own laws in the exercise of its police powers, and does not require an internal revenue stamp, under the war revenue act of 1898. The most notable point in this case is the fact that the Court construes the bond as a part of the license. It is a well established rule that the license itself is exempt from the stamp tax. The court maintains that the license does not express the entire contract between the State and saloon keeper; but that the bond and license taken together, constitute the contract or license, therefore, as part of the license, is not liable to be taxed.

**JUDGMENT—BAR—LIBEL AND SLANDER—CORPORATIONS—UNION ASSOCIATED PRESS V. HEATH**, 63 N. Y. Supp. 96.—The Associated Press had published a libel on the Union Associated Press by sending it to its correspondents. For that publication a recovery was had against the Associated Press by the Union Associated Press. The defendant in this case was a publisher to whom the Associated Press had sent the libel, and he had republished it. *Held*, that the judgment against the Associated Press was no bar to a recovery against him. Van Brunt, P. J., and McLaughlin, J., dissenting.

Though the libel be the same, yet a different publication will give another cause of action. Every publication must be regarded as a new and distinct injury. *Wood v. Pangburn*, 75 N. Y. 498. A recovery for the wrong by the first publisher of a libel is not a satisfaction for the second publication. *Wood v. Pangburn* (supra). The dissenting justices maintain that the recovery against the Associated Press precludes further recovery from other publishers, as the act of sending the article, and the actual publication of it by the recipient, constitute a simple wrong, for which one recovery would be a complete satisfaction as to all. *Knapf v. Roche*, 94 N. Y. 329; *Lord v. Tiffany*, 98 N. Y. 412. The prevailing opinion seems supported by the greater weight of authority.

**LANDOWNER'S PROPERTY IN SUBTERRANEAN OILS AND GAS—OHIO OIL CO. v. STATE OF INDIANA**, 20 Sup. Ct. Rep. 576.—A statute was passed by the Legislature of Indiana restricting the waste of oil and gas by the owner of the soil. *Held*, constitutional and not an interference with the rights of private property.

In the present case subterranean streams are held to be of the nature of things *ferae naturae*, and that property therein is not obtained until a reduction to possession takes place by a confining in vaults, vats or other appropriate receptacle. See Comment.

**LANDLORD AND TENANT—ABANDONMENT OF PREMISES—RELETTING—GRAY v. KAUFMAN DAIRY AND ICE CREAM CO.**, 56 N. E. 903 (N. Y.).—Action to recover two months' rent of plaintiff's premises. Defendant abandoned leased premises of plaintiff, who then wrote to the defendant, refusing to accept his offer to surrender, stating that he would relet premises on his account and hold him responsible for any loss. Defendant did not reply, and an interview was held, and an offer of compromise was made. Said plaintiff wrote defendant that he had an offer for premises at a lower rental, and asked him if he would make good the difference. Not receiving a reply he relet, in his own name, to new tenant. *Held*, that the acts of the plaintiff operated as an acceptance of defendant's offer to surrender, as defendant's failure to reply did not create a presumption that he had agreed to the reletting. Landon, J., dissenting.

Where a tenant abandons premises during his term, without fault on the part of the landlord, the tenant is liable for the rent, but the landlord must relet the premises if possible (12 *Am. & Eng. Enc.* 751). It is hard to see, therefore, why the landlord's reletting of the premises in his own name discharged the defendant (*Locknow v. Hargan*, 58 N. Y. 635).

**LIBEL AND SLANDER—SUBSEQUENT CONDUCT—ADMISSION OF EVIDENCE—MATHEWS v. DETROIT JOURNAL CO.**, 82 N. W. 243 (Mich.).—In an action, in charging that plaintiff and another were found together in a compromising position, where the evidence showed this, and earlier acts of intimacy. *Held*, that evidence of subsequent improper actions of the two together was admissible.

The general rule against the admission of proof of subsequent similar acts to prove commission of an act by defendant in criminal cases, is, it is said, somewhat relaxed where the offense consists of illicit intercourse between the sexes. *Am. & Eng. Enc. of Law* (2d ed.) 1-753 and 4. Evidence of subsequent improper familiarity is held admissible. *Thayer v. Thayer*, 101 Mass. 111; *Crane v. People*, 48 N. E. 54, 169, Ill. 395; *State v. Bridgeman*, 49 Vt. 202, 24 Am. Rep. 124; *Contra, State v. Donovan*, 61 Iowa 278; *People v. Fowler*, 62 N. W. 572, 104 Mich. 449; *Com. v. Pierce*, 11 Grey. 447.

**LIFE INSURANCE—APPLICATION—FALSE STATEMENTS—POLICY—VALIDITY—STERNAMAN v. METROPOLITAN LIFE INS. CO.**, 63 N. Y. Supp. 674.—This was an action to recover the amount due on a policy issued in reliance on a statement contained in the application, and warranted true, which was in fact false, and which was written therein, by the medical examiner of the company, who knew of its falsity and who by the terms of the application was made the agent of the insured party. *Held*, the policy was void. Spring, J., dissenting.

That knowledge by the insured that his statements were false renders the policy void, is undisputed. *Clements v. Indemnity Co.*, 51 N. Y. Supp. 442; also, that an insurance company may require that the person conducting the examination be considered as the agent of the insured and not of the insurer, is well sustained by authority. *Bernard v. Association*, 43 N. Y. Supp. 527. But it has also been held that such stipulations cannot change the facts, and

that where a duly appointed agent of the company acts in its behalf, within the scope of his authority, as otherwise determined, his acts shall be binding on the company. *Whited v. Germania, etc., Ins. Co.*, 76 N. Y. 415. This latter rule seems much more equitable.

**MASTER AND SERVANT—FELLOW SERVANT'S NEGLIGENCE—GENERAL REPUTATION—KNOWLEDGE OF MASTER—LAMBRECHT v. PFIZER**, 63 N. Y. Supp. 591.—A fellow-servant, with a general reputation for incompetency, negligently pushed a truck into a shaft and thereby caused injury to the plaintiff, who was on a platform elevator below. *Held*, master not liable.

The court held that the general reputation for incompetency of a servant among his fellow servants was not sufficient to charge the employer with knowledge of the same without proof of specific cases of negligence, in which respect the plaintiff failed to establish his case. *Park v. Railroad Co.*, 155 N. Y. 215. It has been held, however, that ignorance of incompetency tends to show negligence on the part of the master and he is liable accordingly. 12 *Am. & Eng. Ency.* 912. Cooley, J., seems to favor this idea in *Davis v. Detroit R. R. Co.*, 20 Mich. 124.

**MASTER AND SERVANT—INJURIES TO SERVANT—INSTRUCTIONS—RIBICH v. LAKE SUPERIOR SMELTING CO.**, 82 N. W. 279 (Mich.).—An employee was injured by the explosion of a pot of molten copper which he dumped at a place where there was water. *Held*, that an instruction that it was the duty of the master to warn plaintiff that an explosion might result from contact with water, and of the "nature, force, and probable effect" of such explosion, was not erroneous as imposing upon the master the duty of foretelling the precise result of any possible explosion. The master is not discharged by informing servant generally that the service is dangerous. *Am. & Eng. Ency. of Law* (1st ed.) 14-897. The master should inform servant of dangers likely to result from explosion from contact of hot metal with water. *McGowan v. La Plata Mining and Smelting Co.*, 3 McCrary's Rep. (393). See note to *Farmer v. Ant. Iowa R. R. Co.*, 24 N. W. 895.

**MARITIME TORTS—DEATH FROM NEGLIGENCE—LAW APPLICABLE—RUNDALL v. LA CAMPAGNE**, 100 Fed. 655.—Plaintiff's intestate met his death at sea in the collision of the *La Bourgogne*. Negligence was alleged and damages asked for. *Held*, in absence of allegation that death occurred on the ship flying the French flag, the tort must be held to have been committed on the high seas, to which the local French law is unapplicable and the general maritime law, which gives no action for death by negligence, applies.

This we deem to be a good interpretation of a bad law. Congress should fill the gap in the maritime law that Lord Campbell's Act did for the common law.

**MARRIAGE SETTLEMENTS—SEPARATION—VALIDITY—KING v. MOLLOHAN ET AL.**, 60 Pac. Rep. 731 (Kan.).—Where husband and wife by mutual agreement separated and made mutual conveyances in consideration thereof. *Held*, such conveyances valid in law.

The disposition of courts to regard the intention of contracting parties and their reluctance to permit the marriage status to be disturbed by agreement of the parties have led to fine distinctions among the authorities, Sir William Scott in *Mortimer v. Mortimer*, 2 Hagg. Cous. 318, holding no agreement binding between married persons in consideration of separation; also *Parson's Contr.*, p 358, but an agreement to make a settlement for support during such separation is upheld. *Wilson v. Wilson*, 3 B. & Ad. 743; *Dutton v. Dutton*, 30 Ind. 452. But an executory agreement to this effect before separation has taken place will not be enforced. *Walker v. Walker*, 9 Wall 743.



**MUNICIPAL CORPORATIONS—NEGLIGENCE—EXCAVATIONS—GAS—DEATH—QUESTIONS FOR JURY—CORBIN v. CITY OF PHILADELPHIA**, 45 Atl. Rep. 1070. (Penn.).—Where death of plaintiff's son was caused by gas at the bottom of a trench on defendant's street, while attempting to rescue another who had been overcome by the gas, and there was evidence that the other revived and came up unaided from the bottom of the trench, and that those who went down after the deceased came up uninjured. *Held*, that the question whether the deceased was guilty of contributory negligence was for the jury. *Linnehan v. Sampson*, 126 Mass. 506.

The law has so great regard for human life that it will not impute negligence to an effort to preserve it, if the effort is made with a reasonable regard for the rescuer's own safety. *Eckert v. Railroad Co.*, 115 N. Y. 22.

Mitchell J., Green C. J., Fell J., dissenting. That there is no well recognized principle of law to sustain the results arrived at, only an admiration for heroism, which has no proper place in the administration of justice.

**NEWS AGENCIES—MONOPOLIES—INTER-OCEAN PUBLISHING CO. v. ASSOCIATED PRESS**, 56 N. E. 822 (Ill.).—This is a petition for an injunction to prevent the appellee from expelling appellant from membership in the Associated Press Publishing Co, for an alleged violation of one of its by-laws forbidding a member from publishing any news not obtained from, or with the consent of the association. *Held*, a provision in the by-laws of a corporation organized to gather and sell news to newspapers, and in the contract with the publisher of a newspaper, that one receiving news from it shall not receive news from any other corporation, which its directors shall declare antagonistic to it, is void, as creating a monopoly.

If this decision is followed by other courts it must surely have considerable effect, since it makes news agencies, and other companies of a like nature, quasi-public corporations, and as such, subject to the laws governing them, one of which is the prohibition of monopolies injurious to the public. See Comment.

**OIL AND GAS LEASES—CONDITION PRECEDENT—FORFEITURE—HUGGINS v. DALEY**, 99 Fed. Rep. 606.—Where a lease was given to bore and work gas and oil wells on lessor's land, the consideration being one dollar and a royalty on the products obtained, with a forfeiture clause stipulating for the payment of \$50 in case of failure to bore a well within ninety days, it was held that the failure to comply by completing a well in ninety days made the lease voidable, this being a condition precedent and the whole consideration.

Such leases are construed against the grantee. *Oil Co. v. Fretts*, 152 Penn. St. 451, where the whole consideration is the performance, this makes it a condition precedent. *New Orleans v. Texas & P. R. R.*, 171 U. S. 334. and such condition was not relieved by the provision to forfeit \$50 for failure to comply. Such a lease vests no present title until the condition has been fulfilled, and failure to explore made the lease a *nudum pactum*.

**RAILROADS—WRONGFUL EJECTMENT OF PASSENGER—DAMAGES—BADER v. SOU. PAC. CO.**, 27 South. Rep. 584 (La.).—Where plaintiff had paid the fare to his destination, but was erroneously evicted some distance before reaching his destination, and proceeded to walk there instead of taking the next train, and was injured. *Held*, no recovery.

The doctrine that one injured by the careless or willful act of another, must use ordinary care to keep the damages to the smallest amount is carried, in the present case, to the extent of holding, that if one have money to ride, but walks, and is injured, such care is not exercised. *Beers v. Board*, 35 La Ann. 1132; *Spry v. Ry. Co.*, 73 Mo. App. 203.

**RECEIVERS—BONDS—LIABILITY OF SURETY—GOOD FAITH—***LESTER v. LAWYERS' SURETY CO.*, 63 N. Y. Sup. 804 (App. Div.).—An action, based on a receiver's disobedience of an order of the appellate court requiring him to pay out money, was brought against the surety on the receiver's bond. *Held*, that the defendant may show excuse for the apparent disobedience. *Van Brunt*, P. J., and *McLaughlin*, J., dissenting.

When a receiver disobeys an order of court, his surety cannot be held liable unless by express terms to such orders he is brought himself into privity with his principal. *Thompson v. McGregor*, 81 N. Y. 592; *Douglass v. Howland*, 24 Wend. 25. The surety escaped by showing that previous to the order of the Appellate Court the receiver had paid the money in pursuance of an order of the trial court, which the Appellate Court reversed. *Lovett v. Ger. Ref. Church*, 12 Barb. 67; *Simpson v. Hornbeck*, 3 Lans. 53. Whether or not said payment was made in good faith is a question for the jury.

**SLANDER—PROVINCE OF JURY—***FRIEDBURG v. NUDD*, 60 Pac. Rep. (Kan.) 476.—*Held*, in an action for slander, that the province of the jury extends not only to determining the language used, but also to construing what it means, and instruction is error to the effect that if the jury find certain words were used, then they must find slander therefrom. The entire question is held one of fact. *Royce v. Maloney*, 5 Atl. (Vt.) 395; *Riddell v. Thayer*, 127 Mass. 487; *Vanderlip v. Roe*, 23 Pa. St. 84. But this doctrine is qualified, Judge Starrett dissenting, in *Ry. Co. v. McCurdy*, 8 Atl. (Pa.) 230.

**STATUTE OF LIMITATIONS—BURDEN OF PROOF—***GUPTON v. HAWKINS*, 35 S. E. 229 (N. C.).—Where in an action on a bond the statute of limitations was pleaded as a defense. *Held*, the burden of proof is on the plaintiff to prove that the statute has not run. *Grant v. Burgwyn*, 84 N. C. 560; *Brice v. Brice*, 2 Ind. 87.

**STATUTES OF LIMITATION—WHICH GOVERNS—STATUTORY LIABILITIES—***BRUNSWICK TERM. CO. v. NAT. BANK OF BALTIMORE*, 99 Fed. Rep. 635.—*Held*, in an action brought in Maryland v. defendant bank as a stockholder in an insolvent Georgia bank on a liability created by statute, the Georgia statute of limitations and not the Maryland one governs. *Brawley*, J., dissenting. The general rule is that the *lex fori* controls the remedy, and the statute of limitations pertains to the remedy. The statute of the State, therefore, in which the action is brought applies. But where the liability is purely a statutory one, it apparently forms an exception to the rule. *The Harrisburg*, 119 U. S. 199; *Flash v. Conn.*, 109 U. S. 371; *Fennell v. Southern Kas. R. R.*, 33 Fed. Rep. 427, seems to indicate this. It is clear that no action can be maintained anywhere on such a liability when the statute has run against it in the State giving it. *Krogg v. A. & W. P. R. R.*, 77 Ga. 202; *Eastwood v. Kennedy*, 44 Md. 563; *Halsey v. McLean*, 12 Allen (Mass.) 439; *P. R. R. v. Hine*, 25 Ohio St. 629. So it seems only fair, as this case holds, to compensate for this restriction by allowing the action to be maintained till it is barred in the State creating it.

**TRADE-MARK—CORPORATE NAME—EXCLUSIVE RIGHT—***HYGEIA DISTILLED WATER CO. v. HYGEIA ICE CO.*, 45 Atlan. 957 (Conn.).—The plaintiff had adopted the word "Hygeia" as a trade-mark to designate its product of distilled water and beverages made therefrom. The defendant adopted the same word to designate its products and was sued by the plaintiff for infringement. *Held*, that the defendant could be enjoined.

This case is peculiar, in that the word "Hygeia" permits of two separate and distinct meanings. The word originally was used as the name of a mytho-

logical person. Later on it was adopted as a term synonymous with health. Under this latter signification, as indicative of quality, the decisions of numerous cases would clearly have given the defendant the right to use the term. *Russia Cement Co. v. Le Page*, 147 Mass. 211; *Ginter v. Kinney Tobacco Co.*, 12 Fed. Rep. 782. The facts brought out by the evidence, however, showed that the plaintiff had adopted it under its original meaning, and thus it could be used as a trade-mark. *Edmonds v. Benhow*, Seton (4th ed.) 238; *Barrows v. Knight*, 6 R. I. 434.

**TRUST DEED—ATTORNEY'S FEES—TURNER v. BAGER**, 35 S. E. 592 (N. C.)—A provision in a deed of trust that a fee of 5% should be paid for the services of an attorney in case of foreclosure. *Held*, to be invalid as against public policy.

We have failed to find any direct support for this decision, but the doctrine of a long line of decisions respecting the invalidity of provisions for fees, in the collection of promissory notes and kindred matters seems to have been slightly extended by the present case to embrace the facts involved. *Bullard v. Taylor*, 39 Mich. 137; *Bank v. Sevier*, 14 Fed. Rep. 662.

**VENDOR'S LIEN—WAIVER—CHASTAIN v. HAINES**, 27 Sou. Rep. 510 (Ala.)—Where complainant sold land, the purchase money of which was all paid save \$89.00, and he refused to execute a conveyance until the balance was paid, which amount, however, was disputed, and the parties formally agreed to abide by the decision of arbitrators chosen. *Held*, that when the arbitrators decided the amount due to be \$5.20 and ordered it paid in seven months and an immediate conveyance to be made by the other party, a failure of the vendee to pay the \$5.20 when agreed revives the vendor's lien for the \$89.00.

It seems rather strange that after a proper award by arbitrators that a lien for original purchase money should revive; but the present case holds that the foregoing facts are not sufficient to remove the presumption existing in favor of the retention by the vendor of his equitable lien for unpaid purchase money. *Pam. Eq. Jur.* 1250. *Thompson v. Sheppard*, 85 Ala. 611.

**VOID BONDS—STATUTE LEGALIZING—RETROACTIVE EFFECT—N. Y. LIFE INS. CO. v. COMMISSIONERS**, 99 Fed. Rep. 846.—A county issued bonds to build an armory, under a statute subsequently adjudged void. The Legislature then passed a statute legalizing the bonds, and giving the bondholders an action against the county for their value.

*Held*, such statute was unconstitutional as creating a new right rather than a new remedy, and was repugnant to the clause in the Ohio Constitution against retroactive laws. Where the natural justice of it is clear, it seems the legislature has such power. *Board of Education v. State*, 51 Ohio 531. But it was considered that here the juster remedy would be to recover against the property itself.

**VOID MUNICIPAL BONDS—RECOVERY IN ASSUMPSET—TRAVELLERS' INS. CO. v. MAYOR ETC., OF JOHNSON CITY**, 99 Fed. Rep. 663.—Where a city issued void bonds to subscribe for stock to construct a railroad and depot, which were subsequently built and the stock delivered and retained, a purchaser of such negotiable bonds, payable to bearer, could not recover from the city for money had and received, since the construction of the railroad and depot on the railroad's own property conferred no such direct benefit as would raise an implied promise to pay; and the stock retained was void in its hands.

This is held to be the same in principle as the enhancement of one man's land by improvements made on another's where no promise is raised. *R. R. Co. v. Bensley* 664 U. S. App. 115. But where the city receives money or property into its actual possession, there can generally be a recovery. *Read v. City of Plattsmouth*, 107 U. S. 568; *Chapman v. Douglass County*, 107 U. S. 348; *La. v. Wood*, 102 U. S. 294. In *Parkersburg v. Brown*, 106 U. S. 487, where void bonds were issued to establish a manufacturing plant, the bondholders to follow the property and proceed in rem.

# YALE LAW JOURNAL

---

Vol. IX.

JULY, 1900.

No. 9

---

## THE LAW OF OUR NEW POSSESSIONS.

Two years ago, it might have been said in general terms that the comparatively small state of Louisiana was the only part of our country where the Roman Law, and its offspring the modern Civil Law, were considered as lying at the foundation of Jurisprudence. A Louisiana lawyer would often be asked: "You have the Code Napoleon down there?"—and then he would have to explain what we had that was like the French system of law and what we had that was very different.

But "we have changed all that," and have assumed the burden of what we call our new possessions; held by some kind of tenure, or in some sphere of influence, and inhabited by perhaps twelve millions of people, whose municipal law has been largely derived from Roman sources, and demands to be studied not only in the analytical but in the historical method.

In order to understand the present condition of law and jurisprudence in our new possessions, it is necessary to begin with the history of Spain. We need not dwell on the early career of the early Greek, Phoenician, and Carthaginian colonies in that peninsula. We may begin with the time of Augustus, and may find Spain highly organized under the Roman system of municipalities, and enjoying for a long time what was called the Roman Peace. The country became highly civilized, and distinguished men like Trajan and Martial were natives of the province. The law was that of the classical period of Rome, as modified by the local situation. It was the law of Gaius, of Ulpian, of Papinian, applied and extended by imperial constitutions.

In the 4th century of our era, a great change took place which has left its impress upon the juristic life and thought of both France and Spain, and has in that way influenced the legal history of both French and Spanish colonies. The Visigoths, or West-Goths, came after the fashion of the time, partly as invaders and partly as immigrants who owed in their rude way admiration and allegiance to the Roman Empire. They obtained possession of the southern part of Gaul and a large portion, at least, of the Spanish peninsula. In the 5th century, the Visigothic Kingdom became practically independent of Rome.

Under Euric and Alaric II, in the beginning of the 6th century, a codification was prepared, known sometimes as the Breviary of Alaric II, a compilation of much importance as a matter of fundamental legal history. It antedated by some years the Works of Justinian, and in this respect alone possesses considerable interest. But, furthermore, it was prepared in pursuance of the principle of "personal laws" for the use of Roman subjects of this West-Gothic Kingdom. It contained sixteen books of the Theodosian Code, a collection of Novells or new imperial constitutions of more recent date; the Institutes of Gaius, compressed into two books, and sometimes called the Gothic Epitome of Gaius; some Sententiae or opinions of Paul; some portions of the Gregorian and Hermogenian Codes, and finally one passage from the writings of Papinian. In this way, amid the many chances and changes of this turbulent epoch, many of the best portions of the classical law of Rome were preserved, and the Breviary of Alaric II became Roman Law for Western Europe, at least until the revival of legal studies in the 12th century, when, as Professor Sohm has remarked, "the Corpus Juris of the German King was destroyed by the Corpus Juris of the Emperor of Byzantium."

In the 7th century, the Spanish Code known as the *Fuero Juzgo* was promulgated. The name is significant as indicating, perhaps, the formation of the Spanish language. It is a contraction of *Fuero do los Jueces*, which in turn is a modification of the words *Forum Judicum*. We might translate *Fuero Juzgo*, therefore as a guide or code for the judges; or to use more general terms, as a system of jurisprudence. Opinions very widely differ as to the merits of this work, but it certainly presents an interesting amalgamation of Roman Law with Gothic or Teutonic customs.

Passing over some other compilations, we find it probable that the *jurisconsults* of Spain in the 12th and 13th centuries began to take part in the general revival of legal studies which

had become so extensive in Italy, France and England. In the year 1255, Alphonso the Learned, the king of Castile and Leon, promulgated the *Fuero Real*, a treatise upon law, which may be considered to bear the same relation to the legal system of Spain, at that time, that the Institutes of Justinian bear to the Digest of that Emperor. This work was really preparatory to the framing and promulgation of the *Siete Partidas*, one of the most important and interesting codes that has ever been published in the course of legal development. This was finally promulgated in the year 1348, in the reign of Alphonso II. It is divided into seven parts as its name implies, this division possibly being an intimation of the seven parts of the Digest of Justinian, and having, perhaps, some reference to the supposed sacred character of that number. The *Partidas* are still worthy of careful study, since they are fundamental in the law of Spain and her colonies. When the French colony known as Louisiana was ceded to Spain, in 1763, the code known as the *Partidas* was introduced and became really a large part of the fundamental law of that vast domain. Portions of it were translated into French for the benefit of the inhabitants. Some of its provisions remained as a part of the law of the state of Louisiana, and are referred to in the decisions of her Supreme Court. A translation of the principal portions of the work into English was made by Messrs. Moreau-Lislet and Carleton, and published in 1820, with an introduction giving an account of Spanish Law as then existing.

We may mention in passing a code called the *Nueva Recopilacion* promulgated in the time of Philip II, and the *Novisima Recopilacion* adopted in 1805, in the reign of Charles IV. Nor should the celebrated code of maritime laws called by the Spanish *El Consulado*, and generally referred to in our law books as the *Consolato del Mare*, be forgotten. This remarkable compilation, made by order of the magistrates of Barcelona in the 13th century, is really fundamental in commercial and nautical affairs and has obtained a great authority in the modern civilized world by its intrinsic merits.

We may merely notice in passing also the Code of Commerce adopted in Spain in 1829, and may then take up the much more recent codifications which are to-day the law of what we call our new possessions.

It is understood that as early as 1850, there were persistent efforts made in Spain to revise and codify her laws, but the final adoption of such codes was greatly delayed by the fact that in the various provinces the local *fueros*, charters, and

customs were highly esteemed and jealously guarded. There was not the opportunity to sweep them away that was found in France with her Revolution and her Consulate, and the new codes were only finally adopted after a long delay and with a large reservation of local rights and customs. These reservations, however, would not, I suppose, affect their force in the colonies, and so far as our new possessions are concerned, I assume that the provisions of these codes are generally obligatory.

Taking up these modern codes, their consideration may be arranged in chronological order as follows:—the Code of Procedure of 1881, the Code of Commerce of 1886, the Civil Code of Law of 1889, and the Hypothecary Code, concerning mortgages, privileges and their inscription, extended to the islands in 1893.

The Code of Procedure of 1881, which is in force in our new possessions, represents the Roman practice under the later empire, and is, in theory, the method of procedure which underlies Admiralty and Equity Practice and what we call the Reformed Code Procedure of the present day. It falls into two general divisions, the one concerning the "contentious jurisdiction", where parties are suing each other contradictorily, and the other concerning the "voluntary jurisdiction", where a party goes into court generally in an *ex parte* way, as for example, to open a succession, to probate a will, or to appoint a tutor. The pleadings follow the theory of the time of Justinian, and may be substantially stated as a petition by plaintiff and an exception or answer by defendant.

The Code of Commerce of 1886 which likewise prevails in our new possessions contains four books; the first treating of commerce and commercial people in general; the second concerning contracts which are especially commercial in their character, including mercantile companies, banks, and railways; the third treating of maritime commerce and the law of shipping; and the fourth making provisions in regard to respite and insolvencies, and prescription or limitations in commercial matters.

The Civil Code, of 1889, which is, of course, a code of private law, is an interesting and important work. It is understood that Mr. Alonzo Martinez, one of the most distinguished of Spanish jurists, was one of its compilers. Its general plan is not unlike that of the Code Napoleon and the other European codes of a similar character, as well as the civil codes of Lower Canada, Louisiana, and Mexico. It follows the division sug-

gested by Gaius, in the second century, when he declares that all jurisprudence concerns persons, things, and actions. The subject of actions, or the remedies by which persons may vindicate their rights to things, is, of course, left to the Code of Procedure; and in general terms, the Civil Code, therefore, treats of persons who may acquire rights in things or property; of things or property in which such rights may be acquired, and finally of obligations by the effect of which the property in things is often gained or lost.

This Civil Code likewise contains four books. The preliminary title treats of laws and their effect and application. The first book contains twelve titles, treating of the law of persons, whether as citizens or foreigners, as natural or judicial, as present or absent, with detailed provisions in regard to the relation of husband and wife, parent and child, tutor and minor; and general rules in regard to civil status and its proof.

The second book is divided into eight titles, and treats of things; that is to say, of property, ownership and its modifications; and considers the subject of property as either immovable or movable; as public or private; as subject to ownership, either perfect or imperfect, and to the right of eminent domain; and lays down the rules in regard to its acquisition by accession, by possession, and by invention; and concludes with the statement of the law in regard to servitudes, whether personal in their character, as usufruct, use and habitation; or real servitudes, or easements, springing from the legal or conventional relation of different estates to each other. Rules are also given as to the recording of documents which concern immovable property and real rights.

The third book, containing three titles, embraces the different methods of acquiring property or ownership by occupation, donation and succession.

The fourth book, containing eighteen titles, treats of obligations, and is an interesting treatise upon that important subject, as it presents itself to the mind of the jurist in the latter part of the 19th century. It declares that every obligation consists in giving, doing, or not doing, something; and it recognizes that all legal obligations arise either from contract, from quasi contract, from offense or active tort, from quasi offense or negligence, and finally, in some cases, from an arbitrary provision of law. The different kinds of obligations are discussed, whether conditional or unconditional, divisible or indivisible, several, conjoint or solidary. It then takes up the subject of the extinction of obligations, and states that they may be extinguished



by payment or fulfilment, by the loss of the thing due in certain cases, by the voluntary remission of the debt, by confusion or merger of the rights of creditor and debtor, by compensation, or what we might call set off, and by novation. It then proceeds to take up the subject of contracts as one of the principal sources of obligations; the validity of contracts, the consent of contracting parties, the object of contracts and their cause, their interpretation, rescission and nullity. The writers then proceed to discuss specific contracts, as those of marriage, dowry, and the community of goods existing between husband and wife; and then the contracts of sale, exchange, letting and hiring; rent and emphyteusis, partnership, mandate, loan, deposit, aleatory contracts, such as insurance, compromise or transaction, suretyship, pledge and hypothecation.

They then proceed to lay down the rules in regard to obligations arising in the absence of agreement; firstly, from quasi contracts, in which obligations arise from certain lawful acts in the absence of an agreement, and secondly, from offenses or quasi offenses where obligations arise from unlawful acts, whether from active tort or passive negligence.

The remainder of the work is devoted to dispositions in regard to insolvency and the classification of debtors and creditors as concerns their rights, privileges and preferences; and finally to the subject of prescription or limitations, considered firstly with reference to the prescription or lapse of time by which property and rights may be acquired, and secondly the lapse of time by which rights of action are barred or prescribed.

The style of the work is very concise and accurate. M. Levé, a French judge, writing in 1890, declares it to be a more scientific book than the Code Napoleon. Of course, its compilers had the advantage of about a hundred years of discussion and commentary in continental Europe on these subjects, to say nothing of similar work that had been done in the two Americas.

There is a supplemental provision of this Spanish Code of 1889 which appears to be interesting and important, and which reads as follows:

"1. The president of the Supreme Court, and the presidents of the tribunals of appeal, will send to the Minister of Justice at the end of each year a report of the matters which have been submitted to them in civil cases; and they will point out the defects and difficulties which the application of this Code may have revealed to them. They will indicate with detail the con-

troverted questions and points of law as well as the articles or omissions of this Code which have caused doubt to spring up in the courts.

"2. The Minister of Justice will transmit these reports and a copy of the civil statistics of the same year to the general commission of codification.

"3. After having taken cognizance of these documents, and of the progress realized in other countries which may be taken advantage of in our own, and of the jurisprudence of the Supreme Court, the commission of codification will formulate and address to the Government every ten years a plan of such reforms as it may think proper to propose."

We need not dwell upon the Code of Hypothecary Law which appears to have been enacted in Spain in 1871 and extended to the Islands in 1893. It contains an elaborate codification of the law in regard to mortgages of different kinds, whether conventional or legal, and the method of recording them in such a way as to notify third persons of their existence.

After this somewhat dry statement in regard to the history of Spanish Law and its extension to the Islands which we now possess as objects either of our ownership or protection, it may seem useful to inquire, in the interest of social science, as to the future of jurisprudence in Porto Rico, Cuba and the Philippines. It may be that the example of the Louisiana Purchase of 1803 may throw some light upon this interesting subject. For more than thirty years before that purchase, the vast domain called Louisiana had been a Spanish colony. It is true that in the early history of the French settlement, the laws and ordinances of France and the "Custom of Paris" had been extended to it; but the difference between the law of France and the law of Spain, when applied to colonial conditions, was not great enough to make any especial solution of continuity. When the Spanish took actual possession in 1769, Governor O'Reilly published some rules of practice and some elementary dispositions in regard to crimes and testaments; but, as Judge Martin remarks in his history, the transition from the jurisprudence of France to that of Spain was not perceived before it became complete, and little inconvenience resulted from it because the Spanish and the French laws came, to a large degree, from the same sources.

The net result was that when we acquired the Louisiana Purchase in 1803, its laws and jurisprudence were quite similar to those that now prevail in Porto Rico, Cuba and the Philip-

piners; and the question naturally arose as to what should be done. It was considered that no state carved out of this purchase should ever be admitted to the Union with a Spanish system of jurisprudence in criminal matters. The newly acquired territory was divided into two parts by act of Congress, the one, called the Territory of Orleans, embracing nearly the same area as the present State of Louisiana, and the rest of the purchase being erected into the District of Louisiana. The latter having few inhabitants, and being settled by emigrants from the common law states, adopted the Common Law in the natural and normal way. But the Territory of Orleans had a considerable population who had been living for nearly a century under a system of private law in civil matters derived from France and Spain. The Government of the United States acted very wisely in not undertaking to change the system in civil matters which had thus become interwoven with the social life of the people. It was only in criminal matters that, by the legislation of 1805, the Common Law of England was adopted as a basis of definition and practice in criminal cases. The law in civil matters remained unchanged, and was left to its natural development.

It is submitted that a similar course should be followed with reference to Porto Rico and the Philippines as well as with reference to Cuba, if we are to have anything to say in regard to that Pearl of the Antilles. It is quite likely that some modification ought to be made in regard to the definition of crimes and offenses and the methods of criminal procedure; but so far as private law in civil matters is concerned, there is no better system than that represented by the Spanish codes which I have attempted to describe.

No doubt, in past years, in the administration of justice in these islands, there has been a good deal of malfeasance. But such malfeasance should not distract our attention from the scientific value of these codes. The best law may be badly administered and may thus become an engine of abuse; but when we have good laws, honestly and intelligently administered, then we have an ideal condition of jurisprudence. Let us hope, then, that no effort will be made to disturb the general system of law in our new possessions so far as it concerns civil matters.

WILLIAM W. HOWE.

## THE EFFECT OF A DECISION SUSTAINING A DEMURRER TO A COMPLAINT.

In the drawing of a complaint it is the duty of the draughtsman to make the allegations according to the facts as he claims them to be. It is *prima facie* presumed that competent evidence will be forthcoming at the proper time to establish their truth in case any of them are denied. When a demurrer is filed to a complaint the defendant, for the purposes of the demurrer, admits the truth of the allegations thereof. The questions of law thus raised are submitted to the court for decision. If the demurrer is sustained, the plaintiff may usually amend. In that case no judgment is entered upon the demurrer. If the plaintiff exercises his privilege of amendment, a new fact or series of facts are added to the old complaint, or some of the old ones are omitted, or an entirely new statement is substituted for the one held to be insufficient. If the plaintiff neglects to amend, judgment for the defendant is entered upon the demurrer. It is the effect of the decision sustaining such a demurrer that we desire to consider.

If the plaintiff amends within the requisite time it is very clear that the case stands as if no demurrer had ever been filed. He may then compel the defendant to plead, or he may exercise his right of withdrawal. But it may so happen that before the plaintiff can amend he will be obliged to pay costs as a penalty for his first misleading and as compensation for the trouble and expense which he has caused the defendant. He may conclude not to do this. An instance of this kind is found in the case of *Brennan v. The Berlin Iron Bridge Company*, 71 Conn. 479. In that case the plaintiff brought his action for damages said to have been caused by the negligence of the defendant company, which, as the complaint stated, was building, by contract, a trestle for the Naugatuck Malleable Iron Company. In the course of the work the defendant needed the services of some extra help. Accordingly, two men were loaned by The Malleable Iron Company to assist the defendant's workmen. While so assisting, one of them, Brennan, was injured. Under the Connecticut practice, the case was defaulted by the defendant. The default was afterwards opened and the plaintiff was permitted to amend. To the complaint as amended the defendant demurred because, upon the facts stated, it appeared that Brennan was in the

position of a servant of the defendant and because it appeared that he was injured by the negligence of a fellow-servant. This was a demurrer which went to the substance of the action, and it was sustained by the Superior Court. Afterwards, the plaintiff filed, without leave of the court, and without the consent of the defendant, a substituted complaint. The defendant objected to the allowance of this second amendment and asked that it be erased. The court ordered the substituted complaint stricken from the files, but gave the plaintiff permission to amend upon payment of twenty-five dollars costs. He failed and neglected to amend, but before final judgment was entered up, he filed a notice of withdrawal. The defendant, thereupon, moved that the attempted withdrawal be disallowed and that judgment be entered upon the demurrer. The Superior Court granted the motion and ordered that the judgment be entered.

In a suit between the same parties brought a year after the date of this judgment, for damages caused by the same accident, the plaintiff adopted for his complaint, the substituted one that he had filed in the first case, and which was erased by the court, but which he was then permitted to file upon the payment of the costs as just stated. This new complaint contained allegations different from those to which the demurrer had been filed, and the new allegations were not demurrable. The defendant again defaulted the case and claimed upon the hearing in damages that the former judgment upon demurrer was a bar to the prosecution of the second case. The Superior Court overruled this claim and rendered judgment for the plaintiff to recover substantial damages. Upon appeal the Supreme Court held that the first judgment was a bar and reversed the one rendered in the second case to nominal damages.

The first effect in that case of the decision sustaining the demurrer was to prevent a withdrawal thereafter of the suit. No memorandum or opinion was ever filed by the judge who disallowed the withdrawal, and this branch of the case was never considered by the Supreme Court. We believe that the withdrawal was properly disallowed.

The plaintiff, in filing it, was endeavoring to accomplish something in which he ought not to be assisted by the court. Such an exercise of the right of withdrawal ought not to be favored. He was endeavoring to avoid payment of costs, which the court had ordered him to pay, if he wished to go on with the case. To allow a plaintiff to withdraw a case after a full hearing and determination of such a demurrer, would

be to put the defendant to considerable trouble and expense. When the parties have framed the issues to be tried and a decision has been rendered thereon, it is vexatious for the defeated party to withdraw the case, and bring a new suit. If a party could bring his case, and submit it to the court for decision, and after decision against him, be permitted to withdraw it and thus be rid of the adverse judgment, it would be not only unjust to the other party, but trifling with the court. If he is not satisfied with the decision let him appeal from the judgment.

The Connecticut statute which permits withdrawals is found at the end of Section 988 of the General Statutes, Revision 1888, and provides that "the plaintiff may withdraw any action \* \*

\* before the jury have given in their verdict." A verdict of the jury precedes the rendition of the judgment. So that the case was one step further advanced than the verdict of a jury, when the withdrawal was attempted. The demurrer admitted the truth of the allegations of the complaint for the purposes of the demurrer. Upon the argument of the demurrer it was the same as if the jury had brought in a special verdict finding the facts as alleged in the complaint, and a hearing was had before the court as to the judgment to be rendered. A judgment on demurrer is a final judgment and stands as such, unless the complaint is amended, until it is set aside by appeal or proceedings in error. The case had been decided when the attempted withdrawal was filed.

Black says, in treating of the different kinds of judgment, that they may be "for the defendant when the issue raised by a demurrer is determined in his favor. This is a final judgment and disposes of the case, unless leave be granted to amend the pleading, or withdraw the demurrer, as the case may be."<sup>1</sup>

Swift says: "Final judgments are rendered at the termination of the suit. They may be rendered upon demurrer, verdict, default, confession, *nihil dicit*, and nonsuit. 1. In demurrers the facts are confessed, and the law only controverted; and the court, on determining the question of law, must render judgment for the party who has the law in his favor. 2. The verdict of the jury ascertains the facts in dispute, and the court must render judgment for the party in whose favor the law is found."<sup>2</sup>

In some states, Connecticut with others, there is no statute which governs cases tried by the court without a jury, and there

<sup>1</sup> 1 Black on Judgments, sec. 13, par. 3.

<sup>2</sup> 1 Swift Dig., p. 783.

is some variance in the decisions upon the subject. At common law in England, the right of withdrawal continues up to the time that "the judge has pronounced his judgment."<sup>3</sup> In our Federal Courts it has been held to exist "at any time before the trial is opened to the court."<sup>4</sup> This rule has been adopted in Maine, Massachusetts and New Hampshire. In Pennsylvania "the argument of a demurrer will put an end to the right to discontinue."<sup>5</sup> A plaintiff in Oregon "is entitled to a voluntary nonsuit at any time before trial." And the court defines the word "trial" to be "the judicial examination of the issues between the parties, whether those issues be of law or of fact."<sup>6</sup>

In *Moriarty v. Mason*, 47 Conn. 438, our Supreme Court observes that there are no equities in favor of a party who desires to withdraw a case after it has been decided against him by a committee, which has made out and handed its report to the counsel for the prevailing party. The court held that a withdrawal could not be allowed, although the report had not been accepted, nor judgment thereon rendered, nor the report filed in court.

The second important effect of a decision sustaining a demurrer to matters of substance, which is followed by a final judgment, is that it operates as *res adjudicata*, and is a bar to any subsequent suit between the same parties for the same cause of action. This is so even if a judgment file has never been drawn. That document is a mere *formula* which follows the legal determination of the rights of the parties.<sup>7</sup>

The term "cause of action" has been defined as "matter for which an action may be brought."<sup>8</sup> But the term is often misused and misunderstood. A concrete case may serve to present the subject in a clearer light. In the case of *Wildman v. Wildman*, 70 Conn. 700, the plaintiff and defendant were brother and sister respectively. In a prior suit between them, the plaintiff had alleged that the defendant had in her possession, and had caused to be recorded, two written documents which purported to be deeds conveying certain real estate from the plaintiff to the defendant, and which had never been executed or delivered by the plaintiff. He asked that the deeds be cancelled and set aside. The parties were at issue as to the non-execution and non-delivery of the deeds. Upon the trial of this case it was

<sup>3</sup> *Outhwaite v. Hudson*, 7 Ex. Rep. 380.

<sup>4</sup> *Johnson v. Bailey*, 59 Fed. Rep. 671.

<sup>5</sup> *Kennedy v. McNickle*, 2 Brewster 537.

<sup>6</sup> *Hume v. Woodruff*, 26 Oregon 373, citing *Alley v. Nott*, 111 U. S. 472.

<sup>7</sup> *Clark v. Melton*, 19 S. C. 507; *Ball v. Trenholm*, 45 Fed. Rep. 589.

<sup>8</sup> *Bouvier Law Dict.* (14 ed.) "Cause of Action."

proved that the deeds were properly executed and delivered, but that the property was put in the sister's name to prevent its being subject to an unlawful claim which might arise against the brother's estate in case of his death, and that the sister with full knowledge of the circumstances accepted the deeds and that they were utterly without consideration and were afterwards treated as void between the parties. During the progress of this first trial the plaintiff sought to amend his complaint, so as to state the facts as they existed, but the trial court refused to give him that privilege, and rendered judgment for the defendant. In the suit, which was afterwards brought, the plaintiff alleged the facts as they really were. The defendant pleaded the former judgment in bar alleging that the causes of action were the same, and the Superior Court sustained the plea. This judgment was affirmed by the Supreme Court. The causes of action in the two suits were held to be identical.

A cause of action involves an essential right belonging to the plaintiff and a corresponding essential wrong done by the defendant. The right and the wrong may each be simple or complicated. In either case there is but one essential right and one essential wrong. The subordinate facts which go to make up this right and this wrong are not themselves separate causes of action.

In negligence cases the plaintiff, when defeated once, cannot state his case in a different way claiming other acts of negligence for the same accident. The judgment in the first action is a bar to any subsequent suit. There is but one injury, and the plaintiff can have but one cause of action against the defendant. That cause of action is entire and cannot be split up into several causes of action. The plaintiff having litigated that cause of action in his own way cannot have another day in court.<sup>9</sup>

The other requisite of a judgment in order that it may operate as a bar to another suit for the same cause of action between the same parties, is that the judgment should be upon the merits.

An argument upon a demurrer to a complaint, which sets up a certain state of facts from which it appears affirmatively that the plaintiff has no ground of recovery, is a trial of the case upon its merits, and a judgment sustaining the demurrer is a judgment on the merits.<sup>10</sup>

It frequently happens that a defendant files an answer which sets up matters in confession and avoidance of those

---

<sup>9</sup> *Burritt v. Belfy*, 47 Conn., 327.

<sup>10</sup> *Alley v. Nott*, 111 U. S. 475.



alleged in the complaint, and that this answer is demurred to by the plaintiff, and the demurrer sustained. Courts have made a distinction between a judgment rendered upon such a demurrer sustained, and one rendered upon a demurrer to the complaint. The ground for the distinction being that in the former case the defendant has admitted for all purposes the truth of the allegations of the complaint by not having denied them, and that the judgment sustaining a demurrer to the answer leaves the case without any answer and that the judgment is really rendered either upon default or by confession.

There are a large number of cases, in which it has been held that a judgment rendered upon a demurrer for want of material allegations in a complaint is only conclusive upon the identical state of facts alleged, and that such a judgment does not prevent another action wherein the material facts are supplied, although the suit is for the same cause of action. In other words, if the facts are stated in a different manner in the second action which is not demurrable, it is maintained that the former judgment is not a bar. It is admitted that it would be a bar had the former judgment been upon pleadings and proofs. The case of *Wiggins Ferry Company v. O. & M. Ry.*, 142 U. S. 410, is an example of this class of cases. But we believe, when a judgment is rendered sustaining a demurrer to a complaint, not for any want of material allegations, but because, upon the positive allegations therein contained, it appears that the plaintiff has no right to recover, that such a judgment is a bar to any subsequent suit for the same cause of action.<sup>11</sup> Such a demurrer does not raise issues which are technical or merely formal, but ones which go to the merits of the action. It is the same as if the defendant in the former case had denied the truth of the allegations of the complaint and a trial had taken place, and the court had found all the allegations of the complaint true, and made a finding in the exact language of the complaint, and then the defendant had claimed that though the facts were as the plaintiff alleged, still he has not entitled to recover. The plaintiff would have no cause to complain because the court had found the facts just as he claimed them to be.

Does the fact that a judgment was rendered upon demurrer prevent its being a bar or an estoppel? *Nemo debet bis vexari pro una et eadem causa*, is a most salutary maxim, and as a rule of public policy should receive a liberal construction. It matters little how the facts are arrived at, whether by trial or by an agreed statement, or by an admission of their truth. A plaintiff surely

---

<sup>11</sup> *Gould v. Evansville, etc.*, R. R. Co., 91 U. S. 532-534.

ought not to object that the facts are of record just as he has alleged them to be, and as he permits them to remain, when final judgment is rendered upon them.

If this is not so, a plaintiff, having been defeated upon a substantial demurrer and without further amendment, suffering final judgment to go against him, may bring a second suit, changing slightly the allegations, and will be entitled to another trial, and if defeated again, may bring a third suit, and so on indefinitely, until prevented by the statute of limitations.

It is the duty of the plaintiff to allege all the facts connected with the transaction in his original complaint. After the demurrer is sustained he may generally amend. If he fails and neglects to embrace the opportunity, it is presumed that he desires to stand upon the facts as he has alleged them.

We think a judgment, rendered upon a demurrer to positive facts which appear in the complaint, is, and ought to be, as binding as a judgment after verdict finding those same facts. Where a demurrer is interposed and sustained because of lack of allegations, then the judgment is not upon the merits, and is not a bar. But where a plaintiff sets up certain positive facts and asks the court for a determination of his rights thereon, and a demurrer properly raises the merits of the case, a final judgment upon those merits ought to be binding upon both parties and prevent further litigation upon the same cause of action between them. It should prevent the plaintiff from stating his facts in a different way and having another trial thereon. He is presumed to have alleged them correctly in his first action, otherwise courts will become tribunals to try mooted and imaginary, instead of actual, questions.

Gould, in his work on Pleading, says: "A judgment rendered upon demurrer is equally conclusive (by way of estoppel) of the facts confessed by the demurrer, as a verdict finding the same facts would have been; since they are established, as well in the former case as in the latter, by way of record. And facts thus established, can never afterwards be contested between the same parties, or those in privity with them."<sup>18</sup> The principles here sought to be maintained are supported by several decisions, and by at least two writers of text-books."

---

<sup>18</sup> Gould on Pleading, chap. IX, part 1, sec. 43.

<sup>19</sup> Gould v. Evansville R. R. Co., 91 U. S. 543; Alley v. Nott, 111 U. S. 475; Bissell v. Spring Valley Township, 124 U. S. 225; Lamb v. McConkey, (Iowa) 40 N. W. 77; Coffin v. Knott, 2 Green (Iowa) 582; Kleinschmidt v. Binzel, 14 Mont. 31; sc. 43 Amer. St. Rep. 604; Strain v. Illinois Central R. R. Co. (Miss.) 18 So. 847; Bigelow on Estoppel (5th ed.) p. 56; I VanFleet's Former Adjudication, p. 322, sec. 109.

Suppose a man brings his action for damages caused by injuries resulting from the negligence of a railroad company, and in his complaint it appears that he is a servant of the defendant and was injured by the negligence of a fellow-servant, and that the defendant filed no demurrer but defaulted the case and had a hearing in damages. In that hearing, suppose the court had found the facts in the exact language of the complaint, and had rendered judgment for the recovery of nominal damages. Would not such a judgment be a bar to any subsequent action for that injury? We understand the difference between such a judgment and one upon demurrer to positive facts alleged, to be that upon the sustaining of the demurrer leave is usually given to amend. But if the plaintiff fail to amend, either of his own election, or because the court refuses to allow him to do so, and he suffers final judgment against him, and fails to appeal, he then stands upon the same footing as in the case of judgment on a hearing in damages and is precluded from again putting the defendant to the annoyance of another suit for the same injury. He has had his day in court, litigated his case in his own way, and had it decided.

If the demurrer had been overruled and the defendant had failed to plead over, judgment would have gone for the plaintiff on demurrer overruled. It makes no difference whether the plaintiff in that case could have recovered substantial damages or only nominal damages, the effect would be the same, and the plaintiff would have been precluded from bringing another action for the same injury.

Our conclusion, therefore is, that after a substantial demurrer to affirmative allegations in a complaint has been sustained, the plaintiff by failing to take advantage of his privilege to amend, and to make his original action good, has waived his rights. The judgment becomes conclusive upon him, and is a bar to any subsequent suit for the same cause of action.

SEYMOUR C. LOOMIS.

New Haven, June 18th, 1900.

# YALE LAW JOURNAL

---

SUBSCRIPTION PRICE, \$2.50 A YEAR.

SINGLE COPIES, 35 CENTS

---

## EDITORS:

NATHAN A. SMYTH, *Chairman.*

WALTER D. MAKEPEACE, *Business Manager.*

JOHN W. EDGERTON,  
ROBERT H. GOULD,  
LESLIE E. HUBBARD,

WARREN B. JOHNSON,  
ARCHIBALD W. POWELL,  
GEORGE ZAHM.

## Associate Editors:

M. TOCSON BENNETT,  
HAROLD R. BERRY,  
EDWARD T. CANFIELD,  
OSBORNE A. DAY,  
JOHN HILLARI,  
WILLIAM H. JACKSON,  
CORNELIUS P. KITCHELL,

CHARLES T. LARK,  
GEORGE A. MARVIN,  
ROBERT L. MUNGER,  
JOHN T. SMITH,  
HENRY H. TOWNSHEND,  
THOMAS J. WALLACE, JR.,  
ELIOT WATROUS.

---

Published monthly during the Academic year, by students of the Yale Law School.  
P. O. Address, Box 1341, New Haven, Conn.

---

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuance of the subscription is desired.

---

The following editors have received election to the JOURNAL Board: Harold Ridgeway Berry, Edward Thomas Canfield, Osborne Atwater Day, Charles Tressler Lark, John Thomas Smith, Eliot Watrous. At the regular meeting of the Board, held on June 15, Cornelius Porter Kitchel was elected Chairman and William Henry Jackson, Business Manager.

The Illinois Supreme Court has again emphasized the fact that the legislature can not regulate matters of sentiment and taste. In the case of *Ruhstrat v. People*, 57 N. E. (Ill.) 41, the act recently passed by the State legislature, prohibiting the use of our national flag for any commercial purposes or as an advertising medium, comes up for decision, and the court holds it unconstitutional. The court bases its decision on legal grounds; that it unduly interferes with personal liberty; that it does not tend to promote the health, safety or welfare of society; that it violates the 14th amendment; and that it is discriminative. The case stands on debatable ground, but perhaps is not so doubtful as it would be, were it Congress instead of the State legislature that had passed the law in question. The power that created our flag and laid down rules for its official use, logically at least, ought to have authority to say how it shall be used. That such regulations are a reflection on our

people, and that they are dealing with a subject best left to the individual common sense, is not now the point. The power to regulate the use of that which is given the people should not be denied, if the people have not the ability to regulate it themselves. Such regulation does not discriminate unless you can call forbidding what is wrong discrimination. The whole matter anyway is *malam prohibition* and not *malam in se*. The personal liberty of no one is interfered with. Those bounds only are set which create liberty, but do not limit it, and more remotely the safety of society is increased, unless we can believe American patriotism so dulled as not to take offense at what may almost be called an unholy use of our flag. But all this is more applicable to the general government than to the States. The flag belongs to the people of the United States, and only to the citizens of the individual States as they are citizens of the United States. To the United States government would seem to belong the right to legislate on this subject. While the whole matter should more properly be left to the good taste and sentiment of the people, for there is an adequate remedy for the more violent abuse of the flag, yet if the time does come, which God grant may never be, when such legislation may be necessary, we see no unsurmountable obstacle to prevent such an act from being held constitutional. Until then it is well this act has been held unconstitutional in the State courts.

#### EXTENSION OF THE CONSTITUTION TO PORTO RICO.

We approach with considerable diffidence a review of the kindred cases, *Ex parte Ortiz*, 100 Fed. Rep. 955, and *Goetz Bros. v. U. S.* (not yet reported), involving the extension of the Constitution over Porto Rico, because of the intricacy of the problem, the importance of its solution, and the contrary results reached by the learned judges. In the first, Lochren, J., held that the Constitution *ex proprio vigore* extended to Porto Rico, but refused to release Ortiz because he was tried and convicted before the ratification of the treaty; in the second, Townsend, J., in deciding that duties could be collected in New York on goods imported from Porto Rico, reached the conclusion that the Constitutional provision as to uniformity in duties, imports and excises does not apply. Both are able expositions of their respective views; *Ex parte Ortiz* being discussed in the light of general principles, and *Goetz Bros. v. U. S.* more analytically, with a fuller review of authorities and historical precedents.

The ultimate question is, can the United States, a government of enumerated powers, granted expressly or impliedly by the Constitution,—and possessing none other,—govern territory as to foreign nations a part of the United States and yet to which the Constitutional limitations do not apply? It is clear there is no such express provision. It only remains, therefore, to consider, is it necessarily implied? and upon this, opinions will differ so long as ideas of the meaning, purpose and scope of the Constitution differ.

Preparatory to an affirmative inference, Townsend's, J., first proposition is that mere acquiring of the soil does not enlarge our Constitutional boundaries. That mere temporary acquisition by conquest does not is abundantly supported by *Fleming v. Page*, 9 Howard 603. But the next deduction that the status of Porto Rico depends not upon the sovereignty of the land, but upon the status of the inhabitants, gives rise to some doubt. It will be remembered that the Constitutional provision is that all duties, imports and excises shall be uniform throughout the United States. The limitation apparently is one of place and not citizenship, so that even if the Porto Ricans are not citizens, the New York importers might claim it as the privilege of a citizen. It is of the first importance, therefore, to ascertain if *Fleming v. Page*, *supra*, is authority for making the status of the country depend upon the status of its inhabitants. That case decided (1) that territory could not be acquired merely by conquest, (2) but could by treaty or legislative act, (3) that Tampica being in the exclusive possession of the United States by conquest was a part of the United States as to foreign nations, but was not an integral part of the Union. This is simply equivalent to saying Pretoria is not a part of the British Empire merely because the British war power controls it. The case of Porto Rico presents some points of difference especially in being held by treaty, and the real question as to whether a treaty stipulation leaving to Congress the determination of the civil and political status of its inhabitants, keeps Porto Rico from being included within our Constitutional boundaries, is still left open. Therefore it does not seem to follow as an illative consequence that the status of the islanders is decisive of the status of the island itself. Conceding that Porto Ricans are not citizens, may not Porto Rico still be a part of the United States? The inhabitants of Tampica never lost their Mexican citizenship, while their city was for all purposes no longer a part of Mexico. This was in war. But in the Alaskan treaty the uncivilized tribes are expressly excepted

from the privileges and immunities of citizens, yet it has never been broached that their lands were not part of the United States. Porto Rico was ceded to the United States. These seem to show that the status of inhabitants and the status of the land itself are separable. In the plain meaning of words, "ceding to" means making a part thereof, but it does not generally include special privileges. But owing to the character of our government, once it is granted that Porto Rico is a part of the United States, all the Constitutional guaranties and privileges would seem to follow.

This would defeat the manifest intention of the treaty, viz: to let Congress determine the status. The second proposition of Townsend, J., is that the treaty should not be held unconstitutional so far as it can fairly be upheld. But it is submitted that the only effect would be to take the discretion away from Congress and make the status depend upon the Constitution with a view to which the United States must be considered to have contracted. The ultimate question involves something more than the construction of a treaty. It goes to the root of the power of governing unhampered by the restrictions imposed by the Constitution, rather than to the effect of the expression of such power in a treaty stipulation. Conceding such was the intent, Lochren, J., denies that the United States have any such power. Their vitality is drawn from the Constitution from which they derive all their powers? How, then, can they provide by treaty for the exercise of a power not subject to the Constitution, without which they possess no power? In other words, his argument is that the United States cannot govern at all unless Constitutionally, and to govern Constitutionally, whether in New York or Porto Rico, means subject to the Constitution. If the Constitution does not extend to Porto Rico, the United States have no power to govern it.

On the other hand, Townsend, J., holds that the power to acquire territory without incorporation is an ordinary attribute of sovereignty. To deny it to the United States, since acquiring territory is apt to be a necessity, would be to cripple us severely in our foreign relations. Such an intention cannot be presumed in the framers of the Constitution. The argument is put with great force, and is one that is sure to receive great consideration when the question comes before the Supreme Court. The great cases of *McCullough v. Maryland*, 4 Wheat 316, and *The Legal Tender Cases*, 110 U. S. 421, turned upon this very question of implied powers within the scope of the Con-

stitution, and not expressly prohibited. But these involved the exercise of powers upon which the Constitution was silent; the argument against the present contention is that it trenches upon inhibited powers.

Summing up, then, the arguments against the extension are (1) the status of Porto Rico depends upon the status of its inhabitants, left expressly by the treaty to be determined by Congress, and until so determined, must be considered as foreign; (2) the clear intention of the treaty was to keep Porto Rico from being a part of the United States; (3) such power of exclusion is an ordinary attribute of sovereignty, which the United States possess.

In favor of the extension it is argued (1) that treaty cannot confer upon the United States prerogatives which it does not already possess; (2) that there is no inherent power in a Constitutional government of governing without the Constitution; (3) the Constitution must extend wherever the power of government extends, for without and beyond it, there is no power.

On the whole we incline to the belief that as a question of Constitutional law, apart from considerations of expediency, there is no power under the Constitution to govern territory outside of the Constitution. To hold that there is such a power logically puts Congress, the creature of the Constitution, above the source of its power, and gives to the provision for making necessary and needful rules respecting territories, a potency and application that is denied to the Constitution itself, without which the sweeping clause is of no effect. Such we think could not have been the intention of the founders of a Constitutional government, for it gives to Congress a power without control.

We have refrained from discussing seriatim the cases cited because of the serious conflict as to the proper construction of the cases involved. It gives rise to some regret, however, that *Scott v. Sanford*, 19 How. 393, finds no place in *Goetz Bros. v. U. S.* This is a strong case against the position taken by the court, and in which Taney, J., with whom eight justices concurred, held that there was no power under the Constitution to hold territories as colonies. This surely makes against the argument that to acquire territory without incorporating it, is an attribute of Constitutional sovereignty, and comes with singular force from the justice who wrote *Fleming v. Page*, upon which a great part of *Goetz Bros. v. U. S.* rests.



## RECENT CASES.

**BANKRUPTCY—ALIMONY—EFFECT UPON—***IN RE NOWELL*, 99 Fed. Rep. 930.—*Held*, arrears in alimony upon which execution had not issued, did not in Massachusetts constitute a probable debt which a discharge in bankruptcy would bar. This is because its susceptibility to modification prevents its being a fixed, absolute liability. *Kerr v. Kerr* (1897) 2 Q. B. 439; *In re Lachemeyer*, Fed. Cas. No. 7966; *In re Shepard*, 97 Fed. 187; contra, *In re Houston* (D. C.) 94 Fed. 119, following the Kentucky law; *In re Van Orden* (D. C.) 96 Fed. 86, following New Jersey law, and *In re Challoner*, 98 Fed. 82, the law in Illinois.

**BILLS AND NOTES—INNOCENT PURCHASERS—WRITTEN INSTRUMENT—DENIAL OF EXECUTION—***WARMAN ET AL. V. FIRST NATIONAL BANK OF AKRON, OHIO*, 57 N. E. 6 (Ill.).—The bank discounted two notes for appellant and gave credit to the payees thereon. In an action by the bank to recover it was *held*, that in order to prove that a bank discounting a note is an innocent purchaser, it is not enough to show that the proceeds were placed in the payee's credit, by way of deposit, but it must also be shown that the payee was not indebted to the bank at the time, and that he has not since then and before notice to the bank of the defenses to the note, withdrawn his account. Magruder, J., dissenting.

That the bank had possession of the notes was *prima facie* sufficient proof that it had acquired them bona fide for value, in the usual course of business. *Palmer v. Bank*, 78 Ill. 380. Possession of the notes indorsed in bank by the payee was *prima facie* evidence that the bank was their proper owner, and nothing short of fraud would have sufficed to overcome the effect of such evidence, or invalidate the title thus shown. *Collins v. Gilbert*, 94 U. S. 753.

**CONSTITUTIONAL LAW—DUE PROCESS—ORDINANCE AS TO LICENSE FOR SALE OF CIGARETTES—DISCRETION OF MAYOR—***GUNDLING V. CITY OF CHICAGO*, 20 Supt. Ct. Rep. 633.—The city of Chicago passed an ordinance regulating the sale of cigarettes and imposing a license tax of \$100, the fitness of the applicant to be determined by the mayor. Plaintiff was convicted for selling without a license.

*Held*, not to be a violation of the 14th amendment requiring due process of law, the power of the mayor was discretionary and not arbitrary as in *Yick Wo v. Hopkins*, 118 U. S. 356, and that also whether a license fee of \$100 partook of an excise tax or not, it violates no provision of the Federal Constitution, and was authorized by State.

**CONSTITUTIONAL LAW—PERSONAL LIBERTY—ADVERTISING BUSINESS—USE OF FLAG—***RUHSTRAT V. PEOPLE*, 57 N. E. 41 (Ill.).—The Act April 22, 1899 (Ill), prohibited the use of the national flag for any commercial purposes, or as an advertising medium, and plaintiff was convicted for violation of that act and brings error. *Held*, the act was unconstitutional. Cartwright, C. J., Wilkins and Carter, J. J., dissenting. See Comment.

**CONSTITUTIONAL LAW—SUNDAY LABOR—CLASS LEGISLATION—***PETET V. STATE OF MINNESOTA*, 20 Supt. Rep. 666.—The State of Minnesota passed a statute forbidding all labor on Sunday except such as was of charity or necessity, and further provided that keeping open barber shops on Sunday was not to be deemed within the exceptions. Under this, plaintiff was tried and convicted for keeping open on Sunday. *Held*, such act was valid, being within

the wise discretion of the State's police power, and was not class legislation. *Phillips v. Innes*, Clark F. 244; *State v. Frederick*, 45 Ark. 347; *Orient Ins. Co. v. Daggs*, 172 U. S. 557.

DAMAGES—TORTS—INTEREST ON LOSS—RECOVERY—N. Y., N. H. & H. R. R. Co. v. ANSONIA LAND & WATER Co., 46 Atl. Rep. 157 (Conn.).—Owing to negligence of defendant a section of railroad track was washed away, thus necessitating an expenditure by plaintiff of a sum A for repairs and a sum B for transfers meanwhile. The defendant might have known the amount of A at the time of the injury. In an action to recover interest for delay in settlement was allowed on A from date of accident; and also interest on B from the date the amount became known to defendant. *Held*, no error.

Whenever one has knowledge or means of knowledge as to the amount of damage another has suffered by his fault, there is an obligation of prompt compensation resting on him, and the sufferer is not bound to inform him, unasked, as to the amount of his loss. Under such circumstances if a suit has to be brought, damages for the delay may be added. *Parrott v. R. R. Co.*, 47 Conn. 575; *Hubbard v. R. R. Co.*, 70 Conn. 563. As B, the cost of transferring passengers and mail, was not a sum definitely ascertainable until the bill of particulars was filed, after that date damages for the delay were allowable. *Tighman v. Proctor*, 125 U. S. 136; *New Haven Steam Saw Co. v. City of New Haven*, 72 Conn. 276, 287. Not only was the granting of the interest a proper exercise of discretionary power by the court, but the plaintiff had a right to such allowances.

EVIDENCE—ORAL TESTIMONY—WRITTEN AGREEMENT—*DRYER v. SECURITY FIRE INS. CO.*, 82 N. W. Rep. 494 (Ia.).—Where the owner of personal property, being unable to read, was told by an insurance agent that he could move his property after taking out insurance without losing his protection, but the written agreement in the policy forbade such removal. *Held*, the oral evidence admissible to vary the terms of the written agreement.

We have found no precedent with facts identical with those of the present case; similar decisions have been made, but the statements admitted to vary the terms of the written policy were contained in the application. The present case in admitting the verbal declarations of the agent for that purpose seems clearly a departure. *McComb v. Ins. Co.*, 83 Iowa 247; *Stone v. Ins. Co.*, 28 N. W. 47.

INTERSTATE COMMERCE—STATE REGULATION—CLEVELAND, CINCINNATI, CHICAGO & ST. L. R. R. v. ILLINOIS, 20 Supt. Ct., Rep. 723.—The State of Illinois passed a statute providing that all passenger trains should stop a sufficient length of time at the railroad stations of country seats to receive and let off passengers with safety. The railroad alleged that local traffic was already adequately provided for and such a requirement hampered their through trains. *Held*, it did constitute such a burden; that after local requirements have been satisfied, railroads have the legal right to adopt special provisions for through traffic, interference with which is unreasonable.

This case is a good illustration of what is and what is not a direct burden upon interstate commerce. The prior cases are collated and this seems to be in conformity with them.

INSURANCE—KNOWLEDGE OF AGENT—NORTHERN ASSUR. CO. OF LONDON v. GRAND VIEW BLDG. ASSOC., 101 Fed. 77.—When an insurance company issues a policy containing a condition that it shall be void if there is other insurance on the property without consent of the company and unindorsed on the policy, and the agent who issues it knew of the existence of the other insurance but did not indorse it. *Held*, such knowledge estopped company from enforcing the condition.

In *Carpenter v. Ins. Co.*, 16 Pet. 495, it was held that in order to invoke the doctrine of estoppel, the agent must endorse on the back of the policy the concurrent insurance according to the terms. This decision has never, to our knowledge been overruled. It goes on the principle that strict compliance with the words of the policy are necessary. In the light of more recent decisions and now resting on more substantial grounds, the opinion of the court seems good. *Insurance Co. v. Norwood*, 69 Fed. 71, 16 C. C. A., 136.

**REMOVAL OF CAUSES—PROCEEDING FOR PROBATE OF WILL—WAHL v. FRANZ**, 100 Fed. 680.—*Held*, a proceeding for the probate of a will is not a "suit of a civic nature at law or in equity," so as to be cognizable in the first instance by the Circuit Court of the United States or removable thereto from a State court.

The real question here is, has the United States Court concurrent jurisdiction with State courts in an appealed contest as to validity of a will involving the value of \$20,000. and the parties to which are citizens of different states. *Gaines v. Fuentes*, 920 U. S. 10, seems to say that the Federal Court has such jurisdiction, while the decision *in re Fraser*, Fed. Cas. W. 5,068 would seem to hold contra. The point is not as yet fully and satisfactorily decided.

**STATUTES—CONSTRUCTION—EAU CLAIRE NAT. BANK vs. BENSON**, 82 N. W. REP. 604 (WISC.).—Where a certain statute, rather ambiguous in meaning, was judicially construed by the Court of final resort shortly after its passage, *Held*, an inquiry, subsequently, as to whether this construction was right or wrong, could not be made.

The Court takes the position that when a statute is judicially interpreted shortly after its passage, that such interpretation should be equally noticed by the people of the State as the statute itself, hence, this interpretation whether correct or otherwise becomes part of the law and can not be inquired into, or corrected. *State v. Ryan*, 74 N. W. 544. The present case seems to go very far in the direction of giving importance to such decisions; the general rule being that they are strong evidence of the legislature's intention, while in the case under discussion such evidence is considered conclusive proof of this intention. Potter's Dwaits on Stat., 47-51.

**STRIKE—INJUNCTION—COMBINATIONS OF WORKMEN—PICKETING—EQUITY JURISDICTION—CUMBERLAND GLASS MFG. CO. v. GLASS BOTTLE BLOWERS' ASSN. ET AL.** 46 ATL. 208.—Evidence tended to show that strikers had resorted to picketing, had from time to time forcibly interfered with persons seeking to be employed in their places, and had also occasionally attacked the property of plaintiff. *Held*, that in such a case a court of chancery has jurisdiction to enjoin a continuing trespass or injury to property, though such trespass or injury may also involve a crime.

The court simply ignored the crime involved: "Picketing" has usually been held unlawful. *Beck v. Prot. Union*, 77 M. W. 13; *Am. Steel and Wire Co. v. Wire Unions, etc.*, 90 Fed. 608; *Lyons v. Wilkins*, Eng. let. of App. 1899; *Contra, Winslow Bros. Co. v. Building Trade Council*, Case and Comment, Aug., 1898. "The decision of the question must depend upon the circumstances surrounding each case." A permanent guard in front of citizens' houses or factories is in itself a nuisance. The interference with prospective employees by the strikers warranted an injunction as "each man is bound to observe the right of the employee and employer to seek employment or to employ undeterred by coercive influences."

**TAX ON REFRIGERATOR CARS—INTER-STATE COMMERCE—PRESUMPTION IN FAVOR OF ASSESSMENT—UNION REFRIGERATOR CO. v. LYNCH**, 20 Supt. Ct. Rep. 631.—Plaintiff was a Kentucky corporation, doing a business of furnishing refrigerator cars. It had no offices in Utah, and whenever its cars happened to be there, they were in transit or merely to stop or load. Utah laid a tax upon

the average number of cars. *Held*, the state had this right, *Amer. Rep. Co. v. Hall*, 174 U. S. 70; and as the complaint did not charge that more than the average number of cars had been taxed, it will be presumed that assessment was regular.

WAR REVENUE TAX—EXPRESS COMPANIES, 20 Supt. Ct. Rep. 695. *Held*, under the war revenue tax of 1898, making it the duty of every express Company to issue a bill of lading, with a one cent stamp duly attached and cancelled, the Express Company could raise its charges to meet the tax and thus shift the burden upon the shipper. The court grounds its decision on the fact that there is nothing in the act that leads to the inference that it is unlawful to shift the tax; in fact being an indirect tax, it leads to a contrary inference. The reasonableness of the increased charge was not before the court, and the right of the Company to shift the burden was decisive of the question.

But Harlan and McKenna, J. J., in dissenting, held that the act made it the duty of the Company to provide and issue at his own expense, the bills with stamps attached and cancelled, but that whether the Company could then raise its charges to shift the burden presented no Federal question.

WILLS—COURTESY—DEVISE TO HUSBAND—ELECTION—HUSBAND'S ADMINISTRATION—LEGACIES—KERRIGAN ET AL. V. CONNELLY, 46 Atl. 227.—Testatrix devised a life estate in common to her husband and children in a portion of her realty, subject to payment of legacies out of rents. Husband, who received no other bequest, on failure of her executors, administered her estate and received all said rents. *Held*, that his action showed no election to take under the will in lieu of his more valuable right of tenancy by the curtesy.

The land, at his death, was held subject to the payment of the legacies, although he had received a sufficient amount in rents to satisfy them, as he did not receive said rents as administrator *c. t. a.* The burden of showing election rests on the party asserting it. *Worthington v. Wiginton*, 20 Beav. 67, 74. The mere acceptance of an appointment as an executor will not in general be deemed a waiver of curtesy. *Tyler v. Wheeler*, 160 Mass. 206, 35 N. E. R. 666.

## BOOK REVIEWS.

**Probate Reports Annotated.** By George A. Clement. Vol. 4. Baker, Voorhis & Co. New York, 1900. Sheep, pp. 767.

Probate Reports Annotated seem to contain a collection of well selected cases with good notes. The work should prove of special value to probate judges, who in the majority of the districts are men who are unversed in the law. This series which is published annually, are made up of the leading decisions, which apply to the varied and important topics upon which a probate judge must render a decision. A good feature of the notes is that they caution the reader as to the possible existence of local statutes upon which the decision may be founded.

**Readings in the Law of Real Property.** By George W. [Kirchwey, Nash Professor of Law in Columbia University. Baker, Voorhis & Co., N. Y., 1900. Canvas, pp. 555.

Professor Kirchwey's work can hardly be regarded as a text-book, but as set forth in the preface, a series of readings. This collection of extracts, which are charmingly written can be most profitably read by the student in connection with his regular work in the subject of Real Property. The history and development of such branch of this important subject is briefly but skillfully treated. The author's aim has been to make this work render the service performed by the second book of Blackstone's commentary. Prof. Kirchwey has endeavored to omit the obsolete doctrines and deal with the law "as a vital thing having actual relation to the life of the community." The fact that Professor Gray of the Harvard Law School has assisted in the work, adds much to its value.

**Lawson on Expert and Opinion Evidence.** Second Edition, T. H. Flood & Co., Chicago.

The favor the first edition met with and the adjudications since are the best reasons for this work. We concur that the text writer should elucidate principles as well as cite cases. In all of the author's many publications this has been the aim and the result clearness and certainty. The table of rules is certainly a great help to the student or practitioner, and we hope other writers will follow the author's lead in this respect. Of the subject and the execution, not much need be said, the ability of the author and the importance of expert and opinion evidence speak for themselves. There is no one subject that has jumped into more permanent prominence than expert evidence, and the author's treatment of it is clear, logical, satisfying and withal succinct,



























